

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1182

RAYMOND MATTZ,
PETITIONER,

v.

G. RAYMOND ARNETT, AS DIRECTOR OF
THE DEPARTMENT OF FISH AND GAME
OF THE STATE OF CALIFORNIA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA, FIRST APPELLATE
DISTRICT

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CHRONOLOGICAL LIST OF RELEVANT
PLEADINGS, HEARINGS, AND ORDERS

- 3/30/70 Petition of G. Raymond Arnett
filed in Superior Court of the
State of California for the
County of Del Norte.
- 3/30/70 Notice of Hearing on petition filed.
- 4/17/70 Intervention By Way of Answer filed
by Raymond Mattz.
- 4/17/70 Order entered granting Raymond
Mattz permission to intervene
and ordering Answer filed.
- 5/1/70 Intervenor's Notice of Request
For Court To Take Judicial Notice
filed.
- 5/1/70 Intervenor's Memorandum Of Points
And Authorities In Support of
Request For Judicial Notice
filed.
- 5/14/70 Trial.
- 6/8/70 Petitioner's Argument filed.
- 6/15/70 Intervenor's Memorandlm Of Points
And Authorities filed.
- 6/22/70 Petitioner's Closing Argument
filed.

- 6/25/70 Intervenor's Supplemental Memorandum Of Points And Authorities filed.
- 7/7/70 Opinion and Decision of Superior Court filed.
- 7/10/70 Intervenor's Notice of Appeal filed.
- 7/10/70 Intervenor's Request For Findings of Fact And Conclusions of Law filed.
- 7/10/70 Order entered directing Petitioner to prepare findings of fact and conclusions of law.
- 7/17/70 Petitioner's Proposed Findings Of Fact And Conclusions Of Law Submitted.
- 7/21/70 Intervenor's Objections To Proposed Findings Of Fact And Conclusions Of Law filed.
- 8/21/70 Hearing on Proposed Findings of Fact And Conclusions Of Law
- 9/4/70 Findings of Fact And Conclusions Of Law (As Adopted) entered.
- 9/4/70 Judgment And Order entered.

10/21/71 Opinion of Court of Appeal of
the State of California, First
Appellate District, filed.

12/16/71 Order Denying Hearing filed by
Supreme Court of the State of
California.

12/27/71 Remittitur filed.

SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE COUNTY
OF DEL NORTE

G. RAYMOND ARNETT, as)
Director of the)
Department of Fish and)
Game of the State of)
California,)

Petitioner,)

vs.)

5 GILL NETS (white)
gill net, 70' long,)
9' mesh with lead)
line and 19 wooden)
floats; green gill)

No. 10434

PETITION

Filed March
3, 1970

net 50' long, 9")
mesh lead line and)
26 wooden floats;)
green gill net 48')
long, 6" mesh with)
lead line and 10 black)
plastic floats; white)
gill net 50' long, 9")
mesh with lead line)
and 18 plastic floats;)
beige gill net 50')
long, 6" mesh with lead)
line and 10 plastic)
floats;)
Respondent.)

TO THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE COUNTY OF DEL NORTE:

Your petitioner respectfully represents that:

(1) At all times herein mentioned, he was and now is the duly appointed, qualified and acting Director of the Department of Fish and Game of the State of California;

(2) At all times mentioned herein, said 5 gill nets, as described above, the respondent herein, were and now are appliances used for the taking and catching of

fish.

(3) On September 24, 1969, in the waters of the State of California, County of Del Norte, to wit: approximately 200 feet from the Klamath River near Brooks Riffle, Fish and Game District No. 1 1/2, said 5 gill nets the respondent herein were then and there operated, used, and maintained willfully and unlawfully in the taking and catching of fish by Raymound [s] G. Mattz (or by a certain person or persons whose identities are presently unknown to your petitioner) contrary to the provisions of sections 8686, 8664 and 8630 of the Fish and Game Code of the State of California in that said respondent net was then and there used for taking fish.

(4) Your petitioner herein, acting by and through Albert Clinton, a duly appointed, qualified, and acting fish and game warden of the Department of Fish and Game, did then and there seize and take said respondent, and said Albert Clinton has ever since kept and now has the same in his possession and under his control, and said Albert Clinton did thereupon forthwith report such seizure to your petitioner herein.

(5) * Said respondent was at all times herein mentioned and now is a public nuisance.

WHEREFORE, your petitioner prays for the judgment of this court adjudging said respondent to be a public nuisance, forfeiting [sic] the same to the State of California and ordering said respondent to be sold or destroyed in whole or in part.

DATED: February 24, 1970

THOMAS C. LYNCH, Attorney
General

RODERICK WALSTON

/s/ Roderick Walston

Deputy Attorney General

Attorneys for Petitioner

(Verification omitted in printing)

SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE COUNTY OF DEL NORTE

INTERVENTION BY WAY OF ANSWER

Filed April 17, 1970

(Title omitted in printing)

Comes now Raymond G. Mattz and, by leave of Court first had and obtained, intervenes in the above-captioned proceeding and in answer to the petition on file

herein denies and alleges as follows:

I

Alleges that at all times mentioned in said petition he was and now is the owner and entitled to the possession of the respondents in this case, described in the said petition and taken on the 24th day of September, 1969 in the waters of the State of California, in said County of Humboldt, to wit: approximately 200 feet from the Klamath River near Brooks Riffle.

II

Denies each and every allegation, all and singular, conjunctively, disjunctively and singularly and specifically denies the allegations that the said gill net was used or maintained unlawfully in the taking and catching of fish or contrary to the provisions of the existing statutes and laws of the State of California for the protection of fish, or in violation of Section 8664 and 8686 and 8630 of the Fish and Game Code and further specifically denies that said net was or is a public nuisance.

III

As and for a further, separate and

distinct defense to said petition, this answering intervenor alleges that:

(1) That he is a person within the provisions of Section 12300 of the Fish and Game Code and, further that under the provisions of Title 18, USCA, Section 1162 and Title 28, USCA, Section 1360, and by treaty and agreement of the United States with Indian tribes, the provisions of the Fish and Game Code are not applicable to the Intervener.

WHEREFORE, this answering Intervener prays that the petitioner take nothing by its petition and that the respondent gill nets be returned to him forthwith; for costs of suit and further relief as to the Court may seem meet and proper in the premises.

/s/ Robert J. Donovan
Attorneys for said Answering
Intervener
ROBERT J. DONOVAN

STATE OF CALIFORNIA)
COUNTY OF DEL NORTE) ss.

Raymond G. Mattz, being sworn deposes and says:

That he is the Intervener in the above entitled action; that he has read the fore-

going "Intervention by Way of Answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

/s/ Raymond G. Mattz

(jurat omitted in printing)

(Declaration of service omitted in printing)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF DEL NORTE

O R D E R

Filed April 17, 1970

(Title omitted in printing)

Good cause appearing therefor, it is hereby ordered that said Raymond G. Mattz be permitted to intervene herein by filing answer to said petition. Let the within answer be filed upon proof of service of a copy thereof upon counsel for petitioner.
Dated: April 17, 1970

/s/ Frank S. Petersen
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF DEL NORTE

NOTICE OF REQUEST FOR COURT TO
TAKE JUDICIAL NOTICE

Filed May 1, 1970

(Title omitted in printing)

TO THE PETITIONER AND HIS ATTORNEY:

PLEASE TAKE NOTICE that at 9:30 a.m.
on Thursday, May 14, 1970, or as soon
thereafter as this case comes to trial,
intervenor will request Judge Frank S.
Petersen of the above court to take judi-
cial notice of the following regulations
and documents:

(1) August 21, 1864, Proclamation
of Austin Wiley (Superintendent of Indian
Affairs for the State of California) loca-
ting the Hoopa Valley Reservation;

(2) June 23, 1876, Executive Order
of President U. S. Grant establishing
Hoopa Valley Indian Reservation;

(3) October 16, 1891, Executive
Order of President Benjamin Harrison
extending Hoopa Valley Reservation to the
Pacific Ocean;

(4) Letter of November 10, 1855, from
George W. Manypenny (Commissioner, Office
of Indian Affairs) to R. McClelland (Secre-

tary of the Interior);

(5) Letter of November 12, 1855, from R. McClelland to President Franklin Pierce and President Pierce's approval;

(6) Hearings on Survey of Conditions of the Indians in the United States before a Subcommittee of the Senate Committee on Indian Affairs, Part 29, California (72n Cong., 1st Sess., 1932);

* * * * *

Copies of the regulations and documents described in 1 to 7 above are attached.

Dated: April 23, 1970

GEORGE F. DUKE
RICHARD B. COLLINS, JR.
LEE J. SCLAR
ROBERT J. DONOVAN
By /s/ Robert J. Donovan
Robert J. Donovan

SURVEY OF CONDITIONS OF THE INDIANS
IN THE UNITED STATES

HEARINGS
Before a
SUBCOMMITTEE OF
THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

SEVENTY-SECOND CONGRESS

First Session

Pursuant To

S.Res. 79 and 308 (70th Cong.), and S.Res.
263 and 416 (71st Cong.), and S.Res. 323
(72d Cong.)

A RESOLUTION DIRECTING THE COMMITTEE ON
INDIAN AFFAIRS OF THE UNITED STATES SENATE
TO MAKE A GENERAL SURVEY OF THE CONDITION
OF THE INDIANS OF THE UNITED STATES CON-
TINUING UNTIL THE END OF THE REGULAR SES-
SION OF THE SEVENTY-THIRD CONGRESS SENATE
RESOLUTION NUMBERED 70 AUTHORIZING A
GENERAL SURVEY OF INDIAN CONDITIONS

Part 29

California

Printed for the use of the
Committee on Indian Affairs

UNITED STATES

GOVERNMENT PRINTING OFFICE

WASHINGTON: 1934

26465

SURVEY OF CONDITIONS OF THE INDIANS IN THE
UNITED STATES

Saturday, September 24, 1932

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON
INDIAN AFFAIRS

Hoopa Indian Reservation, Hoopa, Calif.

The hearing was called to order at 8 o'clock p.m., Hon. Lynn J. Frazier presiding.

Present: Senators Frazier, Wheeler, and Thomas of Oklahoma.

Present also. Albert A. Grorud, special assistant to the subcommittee; F. H. Daiker, of the Indian Bureau; Mrs. Rheba C. Splivalo, director of the social welfare department and representing Governor James C. Rolph, Jr., of California; O. M. Boggess, superintendent of the Hoopa Indian Agency; Edward Swengel, day school representative, and L. C. Mueller, special officer at large.

* * * * *

STATEMENT OF O.M. BOGGESE

(The witness was duly sworn by Senator Frazier.)

Senator Frazier. How long have you been here as superintendent, Mr. Boggess?

Mr. Boggess. I was here 2 years in May of this year.

Senator Frazier. How long have you been in the Indian Service?

Mr. Boggess. Twenty-five years.

Senator Frazier. How long as superintendent?

Mr. Boggess. Twelve years.

Senator Frazier. How large a reservation have you here?

Mr. Boggess. You refer to this reservation or to the entire jurisdiction?

Senator Frazier. This reservation.

Mr. Boggess. This reservation is 12 miles square and then there is an extension 1 mile on each side for an additional 50 miles down the Klamath River to the east [sic] coast.

Senator Frazier. Is it all connected?

Mr. Boggess. Yes; and it is all classed by the Indian Office as one reservation.

Senator Frazier. What do they call this reservation?

Mr. Boggess. They call it the Hoopa, and the mile strips they call the Klamath.

Senator Frazier. That is down the Klamath River?

Mr. Boggess. The Trinity River flows into the Klamath at the north boundary of the reservation.

Senator Frazier. Then what other groups of Indians are in your jurisdiction?

Mr. Boggess. I have four counties, Del Norte, Siskiyou, Trinity, and Humboldt.

Senator Frazier. And about what is the total number of Indians under your jurisdiction?

Mr. Boggess. About 3,500.

Senator Frazier. What bands are represented in that 3,500--the larger ones?

Mr. Boggess. We classify the coast Indians all under the designation of Coast Indians; that is, from Smith River to the southern part of Humboldt County.

Senator Frazier. That is not a tribal name?

Mr. Boggess. No; but we classify them as coast Indians, and then there is the Upper Klamath Indians and the Lower Klamath Indians, the Hoopa Indian, and the Upper Trinity. Those are the classifications we give them.

Senator Frazier. The Hoopa Indians live in this valley?

Mr. Boggess. Yes.

Senator Frazier. How many of the Hoopa Indians are there?

Mr. Boggess. I would say approximately 400.

Senator Frazier. What about the general condition as to the financial situation?

Mr. Boggess. Well, everyone is hard up during the depression. They have not been able to get good prices for any of their products. They have been helped out somewhat on account of road employment or the Federal-aid project that is being built on the reservation.

Senator Frazier. Do they have allotments in this valley?

Mr. Boggess. Yes; there are allotments on the Hoopa and allotments on the Klamath.

Senator Frazier. Individual allotments?

Mr. Boggess. Yes; and then out on the coast there are quite a few public domain allotments.

* * * * *

CALIFORNIA.

Hoopa Valley Reserv.

[Occupied by Hunsatung, Hupa, Klamath River, Miskeet, Redwood, Sainz, Sermolton, and Tishlanaton tribes; area, 155 square miles; established by act of April 8, 1864 (13 Stat., 39), and Executive orders.]

By virtue of power vested in me by an act of Congress approved April 8, 1864, and and acting under instructions from the Interior Department, dated at Washington City, D. C., April 26, 1864, concerning the location of four tracts of land for Indian reservations in the State of California. I do hereby proclaim and make known to all concerned that I have this day located an Indian reservation, to be known and called by the name and title of the Hoopa Valley Reservation, said reservation, being situated on the Trinity River, in Klamath County, California, to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President of the United States. Settlers in Hoopa Valley are hereby notified not to make any further improvements upon their places, as they will be appraised and purchased as soon as the Interior Department may direct.

Austin Wiley,
Superintendent Indian Affairs for the
State of California. Fort Gaston, Cal.,
August 21, 1864.

EXECUTIVE MANSION,

June 23, 1876

It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River surveyed, in 1875, by C. T. Bissel, and the courses and distances of the east boundary, and that portion of the north boundary east of Trinity River reported but not surveyed by him, viz: "Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked 'H.V.R., No. 3'; thence south $17\frac{1}{2}$ degrees west, 905.15 chains, to southeast corner of reservation; thence south $72\frac{1}{2}$ degrees west, 480 chains, to the mouth of Trinity River." be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to

be set apart, in California, by act of Congress approved April 8, 1864. (13 Stats., p.39.)

U. S. Grant.

EXECUTIVE MANSION,

October 16, 1891.

It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; Provided, however, That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.

Benj. Harrison.

PART III. EXECUTIVE ORDERS
RELATING TO RESERVES

Klamath River Reserve.

Department of the Interior
Office of Indian Affairs.

November 10, 1855.

SIR: Referring to your communication of the 8th of August last to the Acting Commissioner of Indian Affairs, advising him of the approval by the President of the United States of the recommendation of the Department that it was expedient to expend the money appropriated on the 3rd of March last for removing the Indians in California to two additional military reservations, I have the honor now to make the following report:

On the 15th of August last the Acting Commissioner inclosed a copy of your letter of the 8th of that month to the superintendent of Indian affairs in California, with directions to select these reservations from such "tracts of land adapted as to soil, climate, water privileges, and timber, to the comfortable and permanent accommodation of the Indians, which tracts should be unincumbered by old Spanish grants or claims of recent white settlers," limiting the dimensions of the reserves to within 25,000 acres each, and to report to this office a descrip-

tion of their geographical position in relation to streams, mountain ranges, and county lines, etc., and indicating the same upon a map. A copy of that letter is herewith, marked A. By the last mail from California, I have received from Superintendent Thomas I. Henley a report upon this subject, dated the 4th ultimo (a copy of which is herewith, marked B), by which it appears he recommends as one of the reservations aforesaid "a strip of territory one mile in width on each side of the (Klamath) river, for a distance of 20 miles." The superintendent remarks upon the character of the country selected, and incloses an extract from a report (also herewith, marked C) to him of the 19th of June last, by Mr. S. G. Whipple, which contains in some detail a description of the country selected, habits and usages of the Indians, etc., but no map is furnished.

It will be observed from this report of the superintendent that he has deemed it important to continue the employ of an agent and to prepare for raising a crop in order to assure the Indians of the good faith of the Government and to preserve the peace of the country. Considering the great distance of this reserve from the seat of

Government and the length of time it necessarily requires to communicate with an agency at the Klamath, it is desirable that some definite action be taken, if practicable, before the sailing of the next steamer, to leave New York on the 20th instant.

I, therefore, beg leave to ask your attention to the subject, and if you shall be of the opinion from the representations made by the superintendent in California and Mr. Whipple that the selection at the mouth of the Klamath River is a judicious and proper one, that it be laid before the President of the United States for his approval, but with the provision, however, that upon a survey of the tract selected that a sufficient quantity be cut off from the upper end of the proposed reserve to bring it within the limitation of 25,000 acres, authorized by the act of 3d March last.

I also inclose herewith a copy of another letter from Superintendent Henley, of 4th ultimo (marked D), in which he states, in relation to the other reserve, that it is intended to locate it "between the headwaters of Russian River and Cape Mendocino." In reference to both of these proposed reserves, and as connected with the means to

be used to maintain peaceable [sic] relations with the Indians, the superintendent is of opinion that it is of great importance to provide for crops, and that to do so an agent in each instance is necessary. As this last-named selection has not been defined by any specific boundaries, and no sufficient description is given as to soil, climate, and suitableness for Indian purposes, to enable the Department to determine the matter understandingly, of course nothing definite can now be done. But it may not be improper to consider the subject in connection with the general intent as to the particular locality in which it is proposed to make the location.

The reserve proposed on the Klamath River and Pacific coast does not appear from the map of the State of California to be very far removed from Cape Mendocino, or a point between that and Russian River; and as provision is made only for two reserves in the State other than those already in operation, the question arises whether it should not be situated farther in the interior, or perhaps eastern part of the State, than the point referred to. The Noome Lacke Reserve is situated in one of the Sacramento valleys, at

about the latitude of 40 degrees north and 122 degrees of longitude west, about the center of that portion of the State north of the port of San Francisco. As, therefore, the proposed Klamath Reserve, being northwest from the Noome Lacke Reservation, would appear to be adapted to the convenient use of the Indians in that direction, the question is suggested whether the other reserve should not be located farther east and north, say on the tributaries of either Pitt or Feather Rivers. As in the case of the proposed reserve of the Klamath, I am desirous of obtaining your opinion and that of the President of the United States, with such decision as may be arrived at under the circumstances, in season to communicate the same by the next California mail, for the government of the action of superintendent Henley.

Very respectfully, your obedient servant,

Geo. W. Manypenny,
Commissioner.

Hon. R. McClelland,
Secretary of the Interior

Department of the Interior
Washington, D. C.
November 12, 1855

Sir: I have the honor to submit herewith the report from the Commissioner of Indian Affairs of the 10th instant, and its accompanying papers, having relation to two of the reservations in California for Indian purposes, authorized by the act of 3d March last.

The precise limits of but one of the reservations, viz, a strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River, are given, no sufficient data being furnished to justify any definite action on the other.

I recommend your approval of the proposed Klamath Reservation, with the provision, however, that upon a survey of the tract a sufficient quantity be cut off from the upper end thereof to bring it within the limit of 25,000 acres authorized by law.

Respectfully, your obedient servant

R. McClelland,

Secretary.

The President.

Let the reservation be made, as proposed.

Franklin Pierce.

November 16, 1855

* * * * *

(Declaration of Service omitted in printing)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF DEL NORTE

Reporter's Transcript on Appeal [of trial
(May 14, 1970)]

(Title omitted in printing)

APPEARANCES

For the Petitioner:	For the Intervenor:
RONALD V. THUNEN, JR.	ROBERT J. DONOVAN

* * * * *

[12] MR. THUNEN: In that case, Your Honor, I would request that judicial notice be taken of these certified copies of deeds in the Recorder's Office here in Del Norte County. The first deed, which is recorded in Book 12, 388, of the Official Records of Del Norte County, indicates that on December 19, 1955, Frederick S. Strong and others granted to the Simpson Logging Company certain property described as "In Township 13 North, Range 2 East, Humboldt Meridian, in Section 33, Lots 3 and 6."

[13] The second document, as recorded on page 71 of Book 62 of the Official

Records, recites that on December 24, 1959, Harold Lee Ward, a widower, Virginia Palmer Ward and others conveyed by warranty deed to the Simpson Redwood Company Lot 2 of Section 33, Township 13 North, Range 2 East, Humboldt Meridian.

THE COURT: All right, these two deeds will be received into evidence.

* * * * *

[TESTIMONY OF WALTER L. GRAY]

[22] Q. [Mr. Thunen] Now, in the period in excess of thirty years which you have been associated with the Department of Fish and Game in this area, have you acquired any knowledge as to the effect of gill nets on the salmon population?

A. My observations have been that there is considerable take by these nets of salmon.

Q. I see. And does this have any effect on the salmon population, say, for future seasons?

A. In all probability.

THE COURT: "I can't see how that is german [sic] to this case.

MR. DONOVAN: I am willing to let it in, but it is totally irrelevant.

[23] THE COURT: If they are illegal, it's an illegal place to have them, if this is not on an Indian Reservation, that is what we are interested in.

MR. THUNEN: All right, Your Honor, I will accept that and proceed to another question.

THE COURT: I will take judicial notice that man is very harmful to salmon, particularly the white man.

MR. THUNEN: The Court will take judicial notice of the fact that gill nets are particularly harmful to salmon?

THE COURT: They are. They are illegal.

* * * * *

[TESTIMONY OF GENEVA MATTZ]

[34] GENEVA MATTS [sic],

called as a witness by the respondent, having first been sworn, was examined and testified as follows:

THE CLERK: State your name and residence.

THE WITNESS: Geneva Matts, 84 Lauff Avenue, Crescent City.

DIRECT EXAMINATION

[35] BY MR. DONOVAN:

Q. Mrs. Mattz, what is your relation-

ship to Raymond Matts, the intervenor here?

A. He is my son.

Q. I see. What is the extent of -- would you state to the Court the extent of your Klamath River or Yurok Indian blood?

A. I am a full-blooded Yurok Indian.

Q. Would you state your relationship to Susie Brooks?

A. Susie Brooks was my grandmother.

Q. And do you own title and trust for the Susie Brooks allotment?

A. Yes.

* * * * *

[38] Q. (By Mr. Donovan) Now, the Susie Brooks allotment, is that very close to the McCovey Ranch that was referred to?

A. Yes. We are next to McCovey's and Simpson's land. We go -- we run up the river and across the river.

Q. It's right next to the river?

A. Yes, uh-huh.

Q. That is near Brooks Riffle?

A. Yes.

Q. Do you know how Brooks Riffle got its name?

A. After my grandfather.

Q. Who was that?

A. William Brooks.

Q. Okay. How long have you and your family lived there, either full- or part-time used that area?

A. I moved there I think it's in '38 to live there, I had a home there.

Q. Had you lived there as a child?

A. Yes, off and on, when we planted our garden.

Q. And that goes back a few years?

A. Yes.

Q. When you lived there did you ever fish in the river?

A. Yes. Grandpa did. They used nets to net the fish for the smokehouse.

[39] Q. A gill net?

A. Yes, a gill net. And smaller fish like candlefish, they used a dip net because it was smaller. And eels, they used a trigger net, it was a long net for eels. That's what I can remember.

Q. So all your life people have been fishing in and around there?

A. Yes.

Q. Do you remember other Indians besides your family fishing around there?

A. Yes. The men always had -- the

men always had a little place they always fished, where all the Indians come and fished.

* * * * *

[TESTIMONY OF RAYMOND MATTZ]

[43] BY MR. DONOVAN:

Q. Mr. Matts [sic], what -- since your mother is a full-blooded Klamath River Indian, what is the full extent of your Klamath blood? Yurok and Klamath River, I believe the terms are used interchangeably.

A. I believe a little over half.

Q. You heard Mr. Clinton describe certain nets seized on September 24th, 1969; do you recall anything about those nets?

A. Yes. We was going up to fish, and when we went up to check the nets, to get the nets, they were gone. But before that they came over to the river bar and they placed us all under arrest for gill nets, and we says, "We haven't gill netted yet." And they went out and looked in the water to see if we had a net out in the water. So they left then

after that and they picked up the nets then. I suppose they were up on a bank.

Q. And the five nets described by Officer Clinton were your nets?

A. Yes.

Q. Did you tell the officer that they were your nets?

A. Yes.

[44] Q. And he refused to give them to you. Did you have any conversation there about the right to take the nets?

A. Yes. I told them they didn't have any right to pick the nets up because they wasn't even in the water. We wasn't even fishing with them when they picked them up.

Q. Do you consider the Klamath River to be Indian country?

A. Yes.

Q. And have you been -- did you ever go fishing up there up along that area?

A. Yes.

Q. For how long a period of time?

A. Oh, since I have been about 9 years old.

Q. Did you ever use gill nets?

A. Yes.

Q. For how long a period of time?

A. Since I have been about 9 years old.

Q. The same type of nets, generally?

A. Yes.

MR. DONOVAN: I believe that's all,
Your Honor.

THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MR. THUNEN:

* * * * *

[45] Q. *** Where were you at the time -- or where were your nets at the time that Warden Clinton and Warden McClain found them?

A. They were about 20 yards up on the bank, up on the beach.

[46] Q. Were they on your mother's property?

A. Well, you can't tell, hardly, now where the river changed so much after the '64 flood.

Q. So you don't know whether you were on ----

A. (Int'g.) I know I was right by Brooks Riffle there.

Q. But you don't know whether the nets were on your mother's property or not?

A. No, I don't.

* * * * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF DEL NORTE
MEMORANDUM OF POINTS AND AUTHORITIES
Filed June 15, 1970
(Title omitted in printing)

* * * * *

[Exhibit A]

84

[BULL 78
KROEBER]

BUREAU OF AMERICAN ETHNOLOGY
[HANDBOOK OF INDIANS OF CALIFORNIA]

FOOD

The Yurok and their neighbors ate very largely of the acorn, the staple food of most Californians; but fish, that is, salmon, constituted a greater proportion of their food than was usual elsewhere. Small game is sufficiently scarce in their territory to make the taking of salmon much more profitable,

ordinarily. Deer were abundant and their flesh esteemed, but seem hardly to have formed part of the daily food supply. Bulbs were dug in early summer; seeds were beaten off the open prairies on the ridges. Some varieties of the latter were eaten crushed and parched but uncooked, and were much relished for their flavor. Salt was furnished by a seaweed, *Porphyra perforata*, which was dried in round blackish cakes. The people on the coast secured quantities of the large ocean mussel, whose shells make up a large part of the soil of their villages. The stranding of a whale was always a great occasion, sometimes productive of quarrels. The Yurok prized its flesh above all other food, and carried dried slabs of the meat inland, but never attempted to hunt the animal. Surf fish were the principal species taken along the ocean; there is practically no record of fishermen going out in boats. The myths speak of canoe excursions only for mussels or sea lions. The food supply was unusually ample along both coast and river, and the Yurok ordinarily did not have to condescend to the grasshoppers, angle-worms, and yellow-jacket

larvae whose nourishing qualities other tribes of the State exploited. In time of stress, of course, they fell back on almost anything. The large yellow slug of California, which in the damp northwest grows to enormous size, would then be used. Famines are scarcely alluded to in the myths, but must have occurred, as among every people primarily dependent on one seasonal or migratory animal. The average Californian clearly passed most of his life on a much closer food margin than the Yurok, but the minuteness and variety of his diet seem usually to have saved him from dire extremity.

All reptiles and dogs were considered extremely poisonous by the Yurok.

The old custom was to eat only two meals a day and theory made these sparing. Only a poor fellow without control would glut himself, and such a man would always be thriftless. Most men at least attempted to do their day's labor, or much of it, before breakfast, which came late. Some old men still profess to be unable to work properly after they have eaten. The evening meal came toward sunset.

FISH AND GAME

Salmon begin running in the Klamath in spring and in autumn. These are the periods of all the great ceremonies, whether or not these refer directly to fish. The river carries so much water, however--more than any California drainage system except the Sacramento-San Joaquin--that there is scarcely a month in the year when some variety of salmon can not be taken. It may be added that the stream is of undiminished volume up to practically the head of the stretch of Yurok ownership. Fish were taken with dip nets, seines, set gill nets, and harpoons, but of these devices the first was the most usual.

The dip net, or lifting net, as it may be called to distinguish it from a smaller instrument on an oval frame occasionally used by the Karok and other tribes to scoop boiling riffles and rapids (Pl. 6), was let down from a scaffolding built out over the water, almost invariably at some eddy or backwater. Here the fisherman sat on a block or little stool, holding the bone button of the string which closed the entrance to the pyramidal net

stretched out in the current. This net was hung from the bottom of a long A-shaped frame with a bottom crossbar. The whole was hauled out as soon as a pull on the cord had inclosed a salmon, which was then struck on the head with a club. A single night's vigil sometimes produced a hundred salmon, it is stated--a winter's supply, as the Yurok say. At other times a man will sit for half a day without a stir. The old men are much inclined to this pursuit, which would be trying to our restless patience, but gives them opportunity for undisturbed meditation or dreaming or mental idleness along with a sense of profitable occupation. (Pls. 4, 7.)

Lampreys, customarily known as eels, much prized by the Yurok for their rich greasiness, also ascend the river in great numbers, and sturgeon are not rare. Both species are taken much like the salmon, though of course with a different mesh. In the lower river eelpots were also set. Trout in the affluent creeks are too small to be much considered by a people frequently netting 20-pound salmon.

Both salmon and lampreys were split for drying--the former with a wooden handled knife (Pl. 16) of "whale-colored" flint, as the Yurok called it; the latter with a bone awl. A steel knife probably involves a different and perhaps a more precise handling, so that until a few years ago the old women clung to the aboriginal tools. Most of the fish was somewhat smoked and put away in old baskets as strips or slabs. The pulverized form convenient for packing, known also on the Columbia, was probably more prevalent among interior and less-settled tribes like the Shasta. Surf fish were often only sun dried whole and kept hung from poles in rows. They make a palatable food in this condition. Dried salmon is very hard and nearly tasteless, but rather satisfying and, of course, highly nourishing.

A long net was sometimes set for sturgeon. One that was measured had a 6-inch mesh, a width of 3 feet, and a length of 85 feet, but in use was doubled to half the length and double the width.

A measured salmon seine had a scant 3-inch mesh, a width of 3 1/2

feet, and a length of over 60 feet.

Nets were made of a splendid two-ply cordage rolled without tools from fibers of the *Iris macrosiphon* leaf. The gathering of the leaves and extraction of two fine silky fibers from each by means of an artificial thumb-nail of mussel shell was the work of women. The string was usually twisted and the nets always knotted by men. The mesh spacer and netting shuttles were of elk antler; net weights were grooved, pierced, or naturally perforated stones.

* * * * *

[Exhibit B]

HANDBOOK OF THE INDIANS OF CALIFORNIA.

By A. L. Kroeber

Chapter 1.

THE YU'ROK: LAND AND CIVILIZATION.

Quality of civilization, 1; radius and focus of the civilization, 5; towns, 8; town names, 10; organizations of towns, 11; political and national sense, 13; directions, 15; population, 16.

This history begins with an account of the Yurok, a nation resident on the lower Klamath River, near and along the Pacific Ocean, in extreme northern California (Pl. 1), surrounded by peoples speaking diverse languages but following the same remarkable civilization. The complete aspect of this civilization is un-Californian. It is at bottom the southernmost manifestation of that great and distinctive culture the main elements of which are common to all the peoples of the Pacific coast from Oregon to Alaska; is heavily tinged with locally developed concepts and institutions; and further altered by some absorption of ideas from those tribes to the south and east who constitute the true California of the ethnologist.

This civilization, which will hereafter be designated as that of northwestern California, attains on the whole to a higher level, as it is customary to estimate such averaged values, than any other that flourished in what is now the State of California. But it is better described as an unusually specialized culture, for the things in which it is

deficient it lacks totally; and these are numerous and notable.

* * * * *

TOWNS

The territory of the Yurok, small as is its extent, is very unrepresentative of their actual life, since all of their habitations stood either on the Klamath River or on the shore of the ocean. All land back in the hills away from the houses served only for hunting deer, picking up acorns, beating in seeds, and gathering firewood or sweat-house kindlings, according to its vegetation. The most productive tracts were owned privately. They were occasionally camped on, though never for long periods. All true settlements formed only a long winding lane; and along this waterway Yurok life was lived.

The towns--hamlets is an exacter term according to civilized standards--numbered about 54 and are shown in Figure 1. A few of these such as Kenekpul, Tsetskwi, Himetl, Keihkem, Nagetl, Tlemekwetl, and some on the coast, may have been inhabited only from time to time, during the life-

time of a single man or a group of relatives. The Klamath villages mostly lie on ancient river terraces, which gradually decrease in height toward the mouth of the widening stream. Wahsekw is 200 feet up, Kenek 100, Kepel 75, Ko'otep 35, Turip 25, Wohkel 20. The coast towns are almost invariably either on a lagoon or at the mouth of a stream. Tsurau alone overlooks a cove well sheltered behind Trinidad Head. Like the more wholly ocean-situated Wiyot and Tolowa, the Yurok did not hesitate to paddle out into open salt water for miles, if there was occasion; but their habits were formed on the river or still water. The canoe

[Figure 1 on next page]

was designed for stream use rather than launching through the surf; and the coast itself was designated as downstream and upstream according as it extended north or south. Fishing was done at the mouths of running fresh water, or by men standing at the edge of the surf, much more than on the abounding ocean.

* * * * *

(Declaration of service omitted in printing)

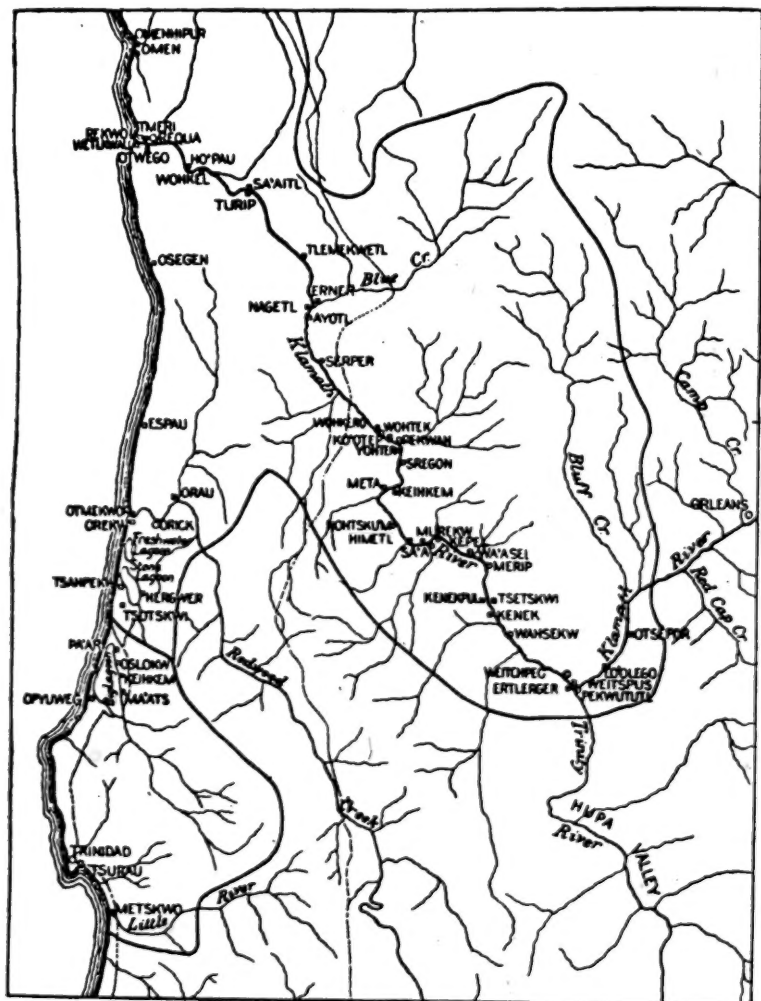


FIG. 1.—Yurok towns and territory. Solid squares indicate sites occupied only during certain periods. Dotted line, redwood timber belt.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF DEL NORTE

OPINION AND DECISION

Filed July 7, 1970

This opinion is at pages 1 and 2 of
Appendix B of the Petition For A Writ of
Certiorari.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF DEL NORTE

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(AS ADOPTED)

Filed September 4, 1970

These findings and conclusions are at
pages 3-5 of Appendix B of the Petition
For A Writ of Certiorari.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF DEL NORTE

JUDGMENT AND ORDER

Filed September 4, 1970

This judgment and order is at pages
6-8 of Appendix B of the Petition For A
Writ of Certiorari.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

OPINION

October 21, 1971

This opinion is Appendix A of the
Petition For A Writ of Certiorari.

SUPREME COURT OF THE STATE OF CALIFORNIA

ORDER DENYING HEARING

Filed December 16, 1971

This order is Appendix C of the
Petition For A Writ of Certiorari.

Supreme Court of the United States

No. 71-1182

Raymond Mattz,

Petitioner,

v.

G. Raymond Arnett, etc.

ORDER ALLOWING CERTIORARI. Filed January 15, 1973.

The petition herein for a writ of certiorari to the Court of Appeal of the State of California, First Appellate District, is granted.

LE COPY

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

G. RAYMOND ARNETT,
as Director of the
Department of Fish
and Game of the
State of California,

Plaintiff and Respondent

v.

5 GILL NETS, etc.

Defendant

RAYMOND MATTZ,

Intervenor and Petitioner

Petition for a Writ of Certiorari to the
California Court of Appeal, First District

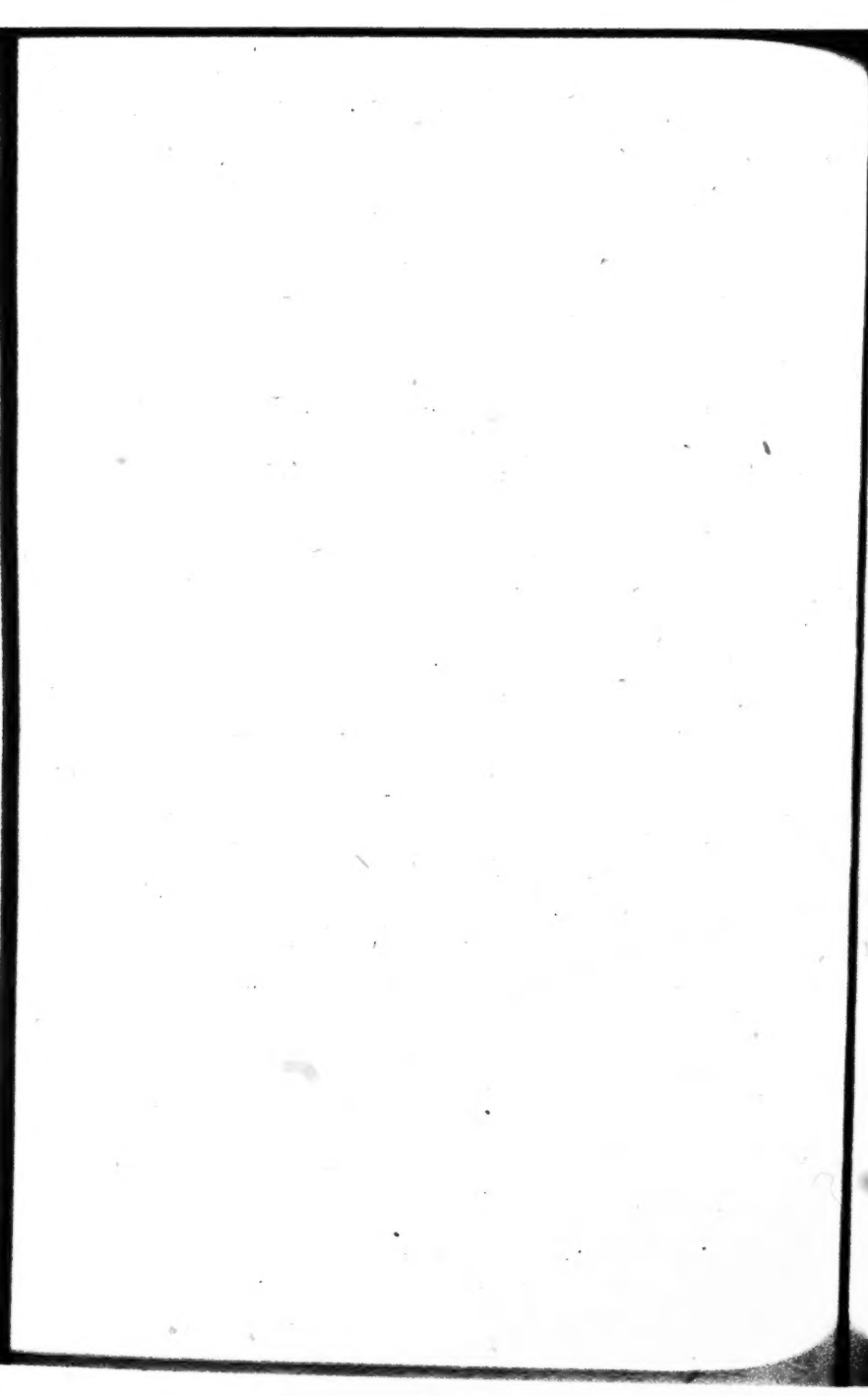
Lee J. Sclar
William P. Lamb
Robert J. Donovan
CALIFORNIA INDIAN LEGAL SERVICES
2527 Dwight Way
Berkeley, California 97404

Attorneys for Petitioner

Sup. Ct. of U.S.
FILED

MAR 14 1972

MICHAEL RODAK, JR., CLERK



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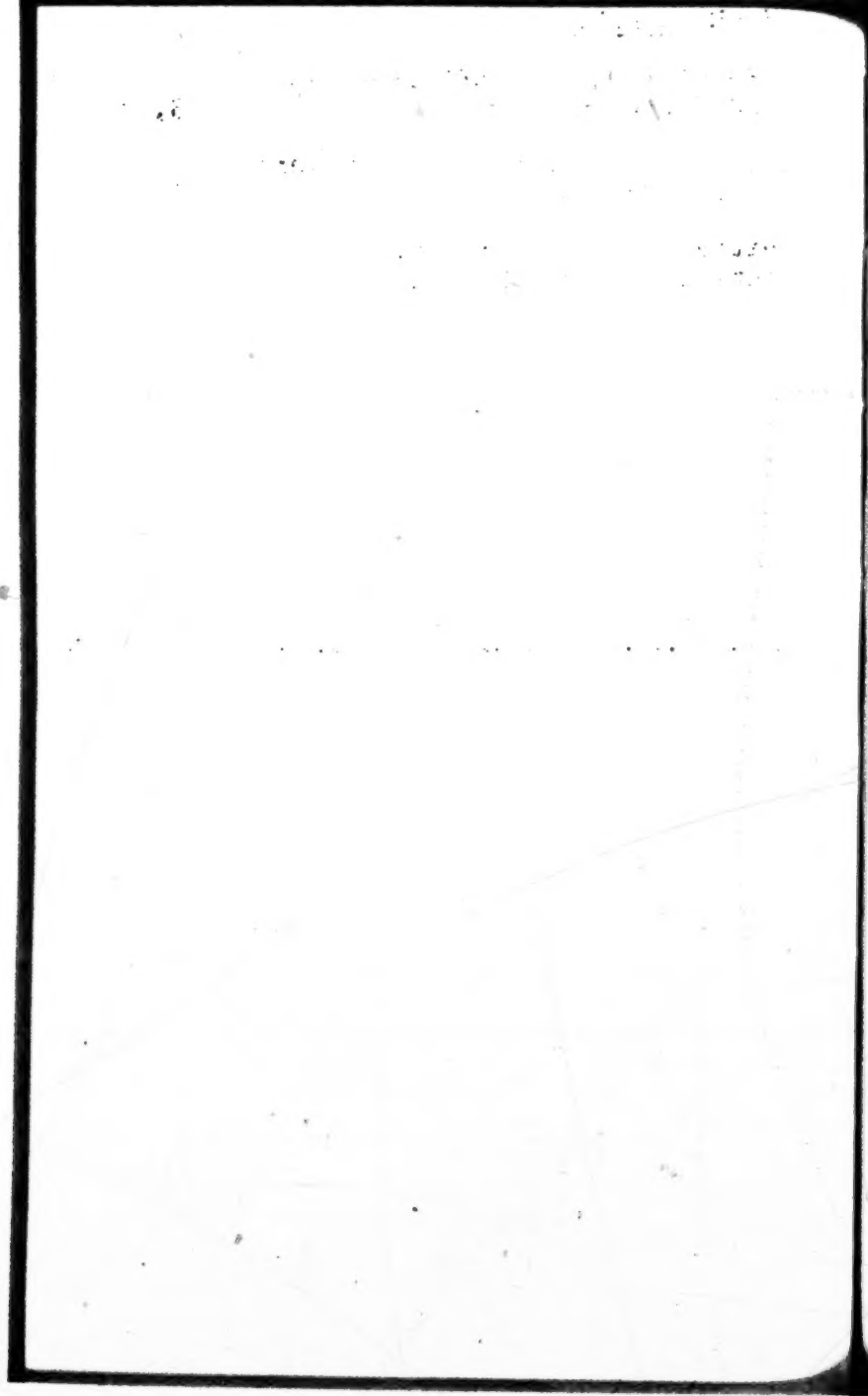
STATUTES AND REGULATIONS

United States

18 U.S.C. §1151	2, 6, 8
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28 U.S.C. §1257	1
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I Kappler, Indian Affairs--Laws and Treaties	3, 4, 5
Kroeber, Handbook of the Indians of California	9
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PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA
COURT OF APPEAL, FIRST DISTRICT

Petitioner, Raymond Mattz, respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the California Court of Appeal, First District, entered in this case on October 21, 1971.

OPINIONS BELOW

The opinion of the Court of Appeal is reported at 20 Cal. App.3d 729, 97 Cal Rptr. 894 and attached as Appendix A. The Opinion and Decision, Findings of Fact and Conclusions of Law, and Judgment and Order of the California Superior Court for Del Norte County are unreported. They are attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeal was entered on October 21, 1971. The California Supreme Court, one judge dissenting, denied a petition for hearing on December 16, 1971. A copy of the order denying a hearing is attached as Appendix C. This petition for a writ of certiorari is due on or before March 15, 1972. (American Railway Express Co. v. Levee, 263 U.S. 19 (1923).) Execution of judgment has been stayed pending final resolution of the case. This court has jurisdiction pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Did a federal law permitting non-Indians to homestead "surplus" land on part of a California Indian reservation abolish that part of the reservation?

STATUTES INVOLVED

18 U.S.C. §§1151 and 1162 and the Act of June 17, 1892, 27 Stat 52, are set out in Appendix D.

STATEMENT OF THE CASE

A California game warden seized five fish nets belonging to Raymond Mattz on September 4, 1969. The nets were seized from a stowage on non-Indian owned property approximately 200 feet from the Klamath River and within 20 miles of the Pacific Ocean.

On March 3, 1970, California petitioned the Del Norte County Superior Court to adjudge the nets a public nuisance and order their forfeiture. Raymond Mattz intervened to oppose the state's petition. He alleged that the land where the nets were seized is part of an Indian reservation, that he is an American Indian enrolled on the tribal roll of that reservation, and that the seizure of the nets therefore violated 18 U.S.C. §1162.

The superior court granted the petition for forfeiture, subject to Mr. Mattz' appeal. The court ruled that the nets were not seized in "Indian Country" within the meaning of 18 U.S.C. §1162. The court made no finding or conclusion as to whether Raymond Mattz is an Indian or as to whether the seizure would have been lawful if the land were part of a reservation.¹

1. This petition presents no question of whether California fishing laws apply on Indian reservations. The superior court did not rule on that question, because it decided the nets were seized outside any reservation.
footnote 1 continued on p. 3

Raymond Mattz appealed, and on October 21, 1971, the California Court of Appeal filed its opinion affirming the superior court's judgment. On December 16, 1971, the California Supreme Court denied Raymond Mattz' petition for a hearing.

REASON FOR GRANTING THE WRIT

THIS COURT'S DECISION IN SEYMOUR V. SUPERINTENDENT IS INCONSISTENT WITH CALIFORNIA'S RULING THAT INDIAN RESERVATIONS ARE ABOLISHED BY FEDERAL LAWS PERMITTING NON-INDIAN HOMESTEADING OF "SURPLUS" RESERVATION LAND.

President Pierce established the Klamath River Reservation by Executive Order in 1855. (I Kappler, Indian Affairs--Laws and Treaties 816-817.) That reservation was a strip of land one mile wide on each side of the Klamath River from the Pacific Ocean up river until it included 25,000 acres. This distance turned out to be approximately 20 miles.

In 1864 a law was enacted which directed the President to establish four reservations for California Indians. (13 Stat.39.) Section 2 of that law authorized the President to

Footnote 1 continued

The Court of Appeal indicated in dicta that state fishing laws apply on an Indian reservation unless a federal treaty, agreement or statute establishes special Indian fishing rights. That is an incorrect statement of the law. State laws also do not apply where fishing rights are afforded under federal regulations. (Metlakatla Indian Community v. Egan, 369 U.S. 45, 56-57 (1962); Dona-hue v. California Justice Court, 15 Cal.App. 3d 557 (1971); Elser v. Gill Net Number One 246 Cal.App. 2d 30 (1966).)

include existing reservations in the four reservations. Section 3 provided for the disposition of the "several Indian reservations in California which shall not be retained for the purposes of Indian reservations, under the provisions of the preceding section of this act." That is, the 1864 law expressly provided that existing reservations would cease to have the status of Indian reservations if not included in the four new reservations. (See United States v. Forty Eight Pounds of Rising Star Tea, 35 Fed. 403 (N.D. Cal. 1888).)

Between 1864 and 1876 the President created four reservations.² One of these was the Hoopa Valley Indian Reservation, which was roughly a twelve mile square around the Trinity River just above its juncture with the Klamath. Neither the Hoopa Valley Reservation nor any of the other three included the 20 miles along the Klamath River closest to the Pacific. The Klamath River Reservation therefore ceased to exist.

In 1891 President Benjamin Harrison issued an executive order extending the boundaries of the Hoopa Valley Reservation to include a strip one mile on each side of the Klamath from the then boundary of the reservation to the Pacific Ocean. (I Kappler, Indian

2. The dates when these four reservations came into existence is somewhat muddled because the President himself did not purport to create a reservation until long after the reservation had been recognized by other government officials. (See I Kappler, Indian Affairs--Laws and Treaties 815; Donnelly v. United States, 228 U.S. 243 (1913); United States v. Forty Eight Pounds of Rising Star Tea, supra.)

Affairs--Laws and Treaties 815.) That strip, about 40 miles long, is sometimes referred to as the Hoopa Extension and included what was the Klamath River Reservation.

Then came the law which is the crux of this litigation. The Act of June 17, 1892, 27 Stat. 52-53, provided that Indians living on "the lands embraced in what was the Klamath River Reservation" were to have one year to select allotments--pieces of land held in trust for individual Indians--from the reservation. After that the Secretary of the Interior was to reserve land being used for Indian villages. Any remaining land was to be disposed of under the homestead acts and the laws authorizing sale of mineral, stone, and timber lands. This "remaining" land was not to be restored to the public domain, however. The proceeds of the land sales, rather than accruing to the Government, were to be held in trust for the maintenance and education of Indians residing on the lower 20 miles of the Extension.

The Court of Appeal ruled that the 1892 act disestablished the reservation status of the lower 20 miles of the Extension. It summarized its view in the following language:

"[T]he opening of the old Klamath reservation to unrestricted homestead entry in 1892 is strongly inconsistent with the continued existence of the reservation; an Indian reservation is by definition an area reserved from homestead entry or other allotment to individual ownership..."

That statement by the Court of Appeal is irreconcilable with 18 U.S.C. §1151 which

3 The uses of the trust fund were changed in an insignificant way by 39 Stat. 976 (1917).

defines Indian country for purposes of 18 U.S.C. §1162 as including "all land within the limits of any Indian reservation...not withstanding the issuance of any patent." The Court of Appeal's decision is also completely inconsistent with Seymour v. Superintendent, 368 U.S. 351 (1962). Seymour held that while the North Half of the Colville Reservation ceased to be Indian country when an 1892 statute restored that half to the public domain, the South Half did not cease to be part of the Colville reservation under a 1906 act providing for sale to the public of "surplus" lands in that part with payment of the proceeds to the Indians' benefit.

As the Court of Appeal noted, the 1892 Colville act was passed only two weeks after the 1892 Hoopa Extension Act. A difference in intent seems reasonable from the fact that one act (Colville) provides for restoration to the public domain while the other (Hoopa Extension) provides only for a sale with proceeds to be used for the Indians benefit. Yet the California court drew the opposite conclusion.⁴

4. Else v. Gill Net Number One, supra, states "Thus [after the 1892 Act], the lower 20 miles of the 40 mile long strip of land included in the 1891 extension of the Hoopa Valley Reservation, for all practical purposes almost immediately lost its identity as part of the Hoopa Valley Reservation." What the court meant by "for all practical purposes" is not clear. That lack of clarity is not surprising, however, for the case involved events on the upper 20 miles of the Extension. Even if the statement were not dicta, however, it would show no more than that Indians have been ignorant of and too poor to enforce their legal rights. And finally, the status of land under 18 U.S.C. §1162 cannot be concluded even by a fifty year old state court decision. (Seymour, supra, 268 U.S. at 353.)

The 1892 Hoopa Extension Act does refer to "lands embraced in what was [the] Klamath River Reservation." However, as explained above, the Klamath River Reservation had gone out of existence by 1891, so that the phrase "what was [the] Klamath River Reservation" was simply a way of describing the lower twenty miles of the Hoopa Extension. The use of that phrase is not inconsistent with reservation status for the lower twenty miles of the extension. (Cf. New Town v. United States Case No. 71-1147, 8th Cir, slip opinion, at 9, 10 (Jan. 17, 1972).)

At least one later act of Congress also shows that the lower twenty miles of Extension remained part of the reservation.⁵ Public Law 85-420, 72 Stat. 121 (85th Con., 2d Sess, 1958), provides in relevant part:

5. Another law which is certainly not inconsistent with the reservation status of the lower twenty miles of the Extension is 25 U.S.C. §348a. It provides in relevant part:

"The period of trust on lands allotted to Indians of the Klamath River Reservation, California, which expired July 31, 1919, and the legal title to which is still in the United States, is hereby reimposed...."

Despite the misplaced modifier, that provision does not mean the reservation expired on July 31, 1919. Rather, the provision means that the trust status of the allotments expired in 1919. As trust periods for allotments were initially for 25 years (25 U.S.C. §348), the allotments referred to were created in 1894 -- two years after the lower twenty miles of the Extension (referred to as the Klamath River Reservation) supposedly ceased to have reservation status.

"All lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership, subject to valid existing rights:

Reservation and State	Approximate Acreage
Klamath River, California	159.57

(Emphasis added.)

The only way lands could be restored to tribal ownership "on" the Klamath River Reservation is if the lower twenty miles of the Hoopa Extension were part of a reservation in 1958. (See Seymour, supra, 368 U.S. 351 at 356-357.) The denomination of that area as Hoopa, Hoopa Extension, or Klamath River Reservation has no bearing on the area's status as part of some reservation and Indian country within the meaning of 18 U.S.C. §§1151 and 1162.

The non-Indian ownership of the land where the nets were seized does not matter either. Non-Indian owned lands within a reservation are nevertheless part of that reservation. (18 U.S.C. §1151; Seymour, supra, 352 U.S. at 357-358; Hildebrand v. Taylor, 327 F. 2d 205 (10th Cir. 1964); New Town v. United States, supra, slip opinion (5th Cir. 1972).)

CONCLUSION

The repeated disregard for Indian rights is a history of "melancholy...tragedies." (See Connors v. United States, 180 U.S. 273 (1901).) Most Indian land has been taken, and the Indians' traditional ways of life have been almost completely wiped out.

Raymond Mattz is a member of the Yurok tribe, a tribe which for centuries has fished with nets along the lower Klamath River. (Kroeber, Handbook of the Indians of California 9, 84-86.) The Yuroks, like other Indians in California and elsewhere in the United States, live in conditions of poverty. Fishing with nets along the Klamath River affords them a way to supplement their diet and retain at least one aspect of their traditional life.

The Hoopa Extension is all that is left of the Yurok's land along the Klamath. It and the other reservation land in California constitute only a minute part of the state. (See United States Department of the Interior, National Atlas, Sheet 272 (1970).) California's effort to further reduce the area where Indians may control their own fishing is totally unconscionable.

California's reading of the Act of June 17, 1892, is also inconsistent with Seymour v. Superintendent, supra, New Town v. United States, supra, and this court's rule that laws affecting Indians are to be construed in the way most favorable to them. (Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Choate v. Trapp, 224 U.S. 665, 675 (1912); United States v. Celestine, 215 U.S. 278, 290 (1909)).

This court should grant a hearing in this case, reverse the judgement below, and remand for further proceedings consistent with the reservation status of the land where Raymond Mattz's nets were seized.

Dated: March 10, 1972

Respectfully submitted

LEE J. SCLAR
WILLIAM P. LAMB
ROBERT J. DONOVAN
CALIFORNIA INDIAN LEGAL SERVICES

By:

Lee J. Sclar

A large, stylized handwritten signature in black ink, which appears to read "Lee J. Sclar", is written over a horizontal line that underlines the printed name "Lee J. Sclar". The signature is highly cursive and loops around the printed text.

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

G. RAYMOND ARNETT, as)	
Director of the Department	)	1 Civil 29109
of Fish and Game of the)	
State of California,	)	(Sup. Ct. No.
	)	10434)
Plaintiff and Respondent,)	
	)	Filed:
vs.)	
	)	Oct. 21, 1971
5 GILL NETS, etc.)	
)	
Defendant.)	
)	
RAYMOND MATTZ,)	
)	
Intervnor and Appellant.)	

Raymond Mattz appeals from a judgment ordering forfeiture under Fish and Game Code section 8630 of 5 nylon gill nets belonging to him. The nets had been seized by a state game warden at a point on the Smith River within one mile of its confluence with the Klamath River. The seizure occurred on land owned by a lumber company, less than 20 miles from the mouth of the Klamath.

Appellant intervened and resisted the petition for forfeiture, asserting that he was an enrolled Indian fishing on Indian country and that the statutory prohibition against the use of gill nets was therefore inapplicable.

In 1953, Congress consented to the

application of California criminal laws to Indians and "Indian country" (18 U.S.C. § 1162); but the enactment preserved Indian rights to fish or hunt "afforded under Federal treaty, agreement, or statute." Thus, appellant's position depends upon a showing (1) that the nets were found on "Indian country" within the meaning of the statute, and (2) that there was "a Federal treaty, agreement, or statute" establishing appellant's right to fish.

Fish and Game Code section 12300, enacted in response to the federal statute, provides that portions of the Fish and Game Code, including those sought to be applied here, do not apply to Indians whose names are inscribed on the tribal roll "while on the reservation of such tribe" in cases where the code would not previously have applied. (See Elser v. Gill Net Number One (1966) 246 Cal.App.2d 30, 36-37.) Thus appellant's entitlement to protection under the California statute also depends on fact determinations: (1) whether appellant was "on the reservation," and (2) whether he was enrolled as a member of the tribe.

The trial court made a single dispositive determination that the land where the nets were seized was not Indian land within the meaning of either 18 U.S.C., section 1162 or Fish and Game Code section 12300. The only issue in the appeal is whether that determination was correct.

The following history of the land where the nets were seized is abstracted from Elser v. Gill Net Number One, supra, 246 Cal.App.2d 30, 33-34, and Donnelly v. United States (1912) 228 U.S. 243, 253-254. The disputed area is a strip running 20 miles upstream from the mouth of the Klamath River, and extending one mile on

either side of the river. The area, inhabited by the Klamath Indians, was early designated the "Klamath River Reservation." The reservation was terminated in 1864 by an act of Congress which authorized the establishment of four reservations in California, and directed that land in the existing reservations not incorporated in the four designated reservations be sold. (13 Stat. 39.) Pursuant to the statute, the Hoopa Valley Reservation was created nearby. No part of the earlier Klamath River Reservation was incorporated in it; the former Klamath River Reservation was later adjudged to have been vacated. (United States v. Forty-Eight Pounds of Rising Star Tea, etc. (Dist.Ct., N.D.Cal. 1888) 35 F. 403, 406.)

Thereafter, in 1891, the Hoopa Valley Reservation was enlarged by executive order to include a strip of land one mile wide on each side of the river running from its former boundary to the mouth of the Klamath River. This order was held to be effective. (Donnelly v. United States, supra, 228 U.S. 243, 258-259.) Then, in 1892, pursuant to the 1887 General Allotment Act, the strip which had previously been the old Klamath River Reservation was opened for public purchase. (27 Stat. 52.) This 1892 enactment is the basis of the conflict here. If it resulted in loss of reservation status of the old Klamath River Reservation area, the trial court was correct in finding that the nets were not seized on "Indian country." The appellate court in Elser, supra, 246 Cal. App.2d 30, 34, declared that the old Klamath River Reservation "for all practical purposes, almost immediately lost its identity as part of the Hoopa Valley Reservation." That statement, though persuasive, was dictum; it

1. 24 Stat. 388.

is therefore proper for us to reexamine the question.

Appellant claims that the land retained some characteristics of Indian interest, enough to justify its definition as "Indian country" under the statutes discussed above. Congress in 1949 defined "Indian country" for present purposes as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . " (18 U.S.C., § 1151.) This definition was applied in Seymour v. Superintendent (1962) 368 U.S. 351, where the United States Supreme Court was called upon to determine the status of another Indian reservation which had been opened to purchase by non-Indians. Although the reservation had been so opened, the court found evidence that Congress had continued to recognize the existence of the reservation; therefore it was held that the state criminal laws did not apply. (368 U.S. at pp. 356-357.) The question is whether the former Klamath River Reservation should be covered by the holding of Seymour.

In Seymour, the court dealt with the Colville Reservation in the State of Washington. In 1892, the Colville Reservation had been divided and the northern one-half "vacated and restored to the public domain" (27 Stat. 62-64). The southern half remained as a reservation. Then, in 1906, Congress authorized the Secretary of the Interior "to sell or dispose of unallotted lands in the diminished Colville Indian Reservation" (34 Stat. 80-82). The act provided for allotments to Indian on the reservation, and provided that proceeds from the sales were to be used for the benefit of the Colville and related Indians (34 Stat. 80-82, § 6). That act was implemented by a proclamation by

President Wilson in 1916 (39 Stat. 1778-1779). The Washington Supreme Court held that the reservation status of the southern one-half of the old Colville Reservation had been extinguished. (State ex rel Best v. Superior Court (1919) 107 Wash. 238, 241, 181 P. 688, 689.) The United States Supreme Court in Seymour held to the contrary, pointing to several indications of congressional intent: (1) the 1906 Act, unlike the 1892 Act which had expressly vacated the northern half of the reservation, contained no language erasing the reservation; indeed, the 1906 statute referred to the continuing existence of the Colville Reservation; (2) the 1892 Act provided that proceeds from sale of the lands could be appropriated for general public use, while the 1906 Act reserved the proceeds of sales there under for the use of the Colville and related Indians; (3) Congress had repeatedly since 1906 referred to the continuing existence of the diminished Colville Reservation (see 368 U.S. at p. 356, fn. 12 and 13), most recently in a 1956 Act -- restoring the unsold lands to tribal ownership -- which referred specifically to "the existing reservation" (70 Stat. 626-627).

The Klamath River Reservation was opened for public purchase in 1892, in a statute enacted a few days before that which vacated the northern half of the Colville Reservation. (27 Stat. 52.) The Klamath statute provided "That all of the lands embraced in what was Klamath River Reservation . . . are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: . . ." The Act provided for Indians then located on the land to apply for allotments within one

year and directed that the proceeds of sale were to be used for the Indians then residing on the land. The provision for disposition of proceeds was amended in 1917 so that the funds might be used for improvements to Indian allotments and for construction of roads, trails, etc. (39 Stat. 969, 976.)

The Klamath River Reservation history bears some resemblance to the Colville history reviewed in Seymour. Like the act opening the southern half of the Colville Reservation, 27 Stat. 52 does not specifically vacate the Klamath River Reservation. Also like the 1906 act, 27 Stat. 52 provides for allocation of proceeds to the Indians of the area rather than to the general revenues of the United States.

However, there are important differences between the Colville history and the Klamath River history. Unlike the 1906 act, which specifically referred to the continuing existence of the Colville Reservation, 27 Stat. 52 does not refer to the Klamath River Reservation as continuing in existence; indeed, it mentions "the lands embraced in what was [the] Klamath River Reservation." (Emphasis added.) The statute opening the Klamath River Reservation was enacted approximately two weeks before the statute vacating the north half of the Colville Reservation, and both acts were implementations of the General Allotment Act, 24 Stat. 388. From the differences in language a difference in intent may reasonably be inferred.

Like the subsequent history of the Colville Reservation, which contains several congressional references to its continuing existence, there are two references to the Klamath River Reservation in statutes enacted

after the 1892 act. In 25 U.S.C., § 348a (enacted in 1942 by 56 Stat. 1081) the "period of trust on lands allotted to Indians of the Klamath River Reservation, California . . ." was extended. Appellant contends that the reference to the "Klamath River Reservation" implies a congressional assumption that the reservation still existed. The context does not support this interpretation; the reference to the reservation seems to have had no greater purpose than to identify the allotments to which the trust extension was to apply. The second congressional reference to the Klamath River Reservation is more significant. In 72 Stat. 121 (Public Law 85-420) it was enacted (in 1958) as follows: "[A]ll lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership, subject to valid existing rights:

"Reservation and State	Approximate Acreage
Klamath River, California.....	159.57
Coeur d'Alene, Idaho.....	12,877.65
Crow, Montana.....	10,260.95
Fort Peck, Montana.....	41,450.13
Spokane, Washington.....	5,451.00

"Provided, That such restoration shall not apply to any lands while they are within reclamation projects heretofore authorized.

"SEC. 2. Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.

"SEC. 3. The lands restored to tribal ownership by this Act may be sold or exchanged by the tribe, with the approval of the Secretary of the Interior."

Use of the expression "on the following named Indian reservations" does indeed suggest that the draftsman of the 1958 statute may have regarded the Klamath reservation as having continued existence. But this apparent understanding of Congress cannot reasonably be construed as an enactment reviving the entire old Klamath reservation which, as we have seen, had been spoken of as defunct in the 1892 statute. Arguably the 1958 statute reestablished as "Indian country" the 159.57 acres which it "restored to tribal ownership." But that area, of course, does not include the privately owned land where the nets were seized.

In summary, the opening of the old Klamath reservation to unrestricted homestead entry in 1892 is strongly inconsistent with the continued existence of the reservation; an Indian reservation is by definition an area reserved from homestead entry or other allotment to individual ownership for the purpose of allowing tribal life and land use to continue. The history reviewed above does not show, as did the Colville history, that Congress intended to preserve the old Klamath Reservation in existence while opening the land to private entry.

The judgment is affirmed.

Christian, Jr.

We Concur:

Devine, P. J.

Rattigan, J.

APPENDIX B.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF DEL NORTE

G. RAYMOND ARNETT, as)	
Director of the Department)	
of Fish and Game of the	)	No. 10434
State of California,)	
)	
Petitioner,)	
)	
vs.)	
)	
5 GILL NETS, etc.,)	
)	
Respondent.)	

OPINION AND DECISION

The court in this decision follows the authorities and the opinion as set forth in Elser vs. Gill Net Number One 246 CA2 30, wherein it was held that Yurok Indians whose names are upon the tribal roll can legally fish with nets on the Hoopa Valley Reservation and the Hoopa Extension. When opened in 1892 by Congress for public purchase the lower 20 miles of the 40 mile long strip of land bordering the Klamath River, included in the 1891 extension of the Hoopa Valley Reservation, for all practical purposes almost immediately lost its identity as part of the Hoopa Valley Reservation. The upper 20 miles of the strip was not affected by the Act of 1892, has remained an integral part of the Hoopa Valley Reservation to the present time and has become commonly known as the Hoopa Extension or Hoopa Extension Reservation.

It appears without conflict that the nets seized were within the lower 20 miles of the Klamath River and therefore not within the boundaries of the Hoopa Reservation or Hoopa Extension.

It is the court's opinion that Section 12300 of the Fish and Game Code, does not apply to the lower 20 miles of the Klamath River and therefore the nets were properly seized as being in violation of Fish and Game Code 8602, 8603, 8664 and 8686. As these nets are contraband they are subject to forfeiture pursuant to Section 8686 and 8630 of the Fish and Game Code.

Respondent makes a very forceful and fascinating argument in his contentions that the area where these nets were seized was still Indian Country and thus the nets were not subject to seizure and forfeiture, but this court concludes it does not have the jurisdiction to make such a determination.

The nets will be ordered forfeited but are not to be sold or destroyed until after the time for appeal has elapsed and if the case is appealed not until after the case has been finally resolved. The court took judicial notice of all the documents.

Petitioner to prepare the formal order.

DATED: July 6, 1970.

FRANK S. PETERSEN
Frank S. Petersen
Judge of the Superior Court

THOMAS C. LYNCH
Attorney General
RONALD V. THUNEN, JR.
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: 557-1799

Attorneys for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF DEL NORTE

G. RAYMOND ARNETT, as)	
Director of the Department	)	No. 10434
of Fish and Game of the)	
State of California,	)	FINDINGS OF FACTS
	)	AND CONCLUSIONS OF
Petitioner,	)	<u>LAW (AS ADOPTED)</u>
)	
vs.)	
)	
5 GILL NETS, etc.,)	
)	
Respondent.)	
)	

This cause came on regularly for hearing before the above entitled court on May 14, 1970, without jury, Ronald V. Thunen, Jr., Deputy Attorney General, appearing on behalf of petitioner, and Robert J. Donovan, California Indian Legal Services, appearing as attorney for the intervenor, Raymond Mattz. After the presentation of evidence on behalf of each party, extensive written arguments were presented. The cause was thereafter submitted to the court for decision, and after deliberation thereon,

the court issued its opinion and decision dated July 6, 1970. Following submission of propeosed findings of fact and conclusions of law by petitioner on July 17, 1970, and the filing of objections to proposed findings by intervenor on July 20, 1970, this court heard arguments on settlement of findings on August 26, 1970, and having considered said proposed findings and objections thereto, the court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

A. Respondent nets were seized by Warden Albert Clinton of the Department of Fish and Game on September 24, 1969. Three of the nets seized had nine inch meshes and the other two had six inch meshes.

B. At the time of seizure the nets were located approximately 200 feet from the Klamath River in the vicinity of Brooks Riffle on Property of the Simpson Timber Company located in Del Norte County.

C. Respondent nets were not in use at the time of seizure, but were stowed in a tub and gunny sack. Respondent nets were the property of one Raymond Mattz.

D. In 1891 a strip of land extending one mile on each side of the Klamath River and running from the mouth of the Klamath approximately 40 miles upstream to the Hoopa Valley reservation was incorporated into said reservation.

E. In 1892, the lower 20 miles of said strip of land was opened by Congress for public purchase, and for all practical purposes almost immediately lost its iden-

tity as part of the Hoopa Valley reservation. The upper 20 miles of the strip was not affected by the act of 1892, has remained an integral part of the Hoopa Valley reservation to the present time, and has become commonly known as the Hoopa Extension or Hoopa Extension or Hoopa Extension Reservation.

CONCLUSIONS OF LAW

1. The area where respondent nets were seized is not "Indian country" within the meaning of 18 U.S.C. section 1162.
2. The place where the nets were seized is not a place where Fish and Game Code section 12300 applies.
3. The nets were properly seized as being in violation of Fish and Game Code sections 8602, 8603, 8664 and 8606.
4. Respondent nets are contraband and are subject to forfeiture pursuant to sections 8686 and 8630 of the Fish and Game Code.

DATED: Sept. 4, 1970

FRANK S. PETERSEN
JUDGE OF THE SUPERIOR COURT

THOMAS C. LYNCH
Attorney General
RONALD V. THUNER, JR.
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: 557-1790

Attorneys for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF DEL NORTE

G. RAYMOND ARNETT, as)
Director of the Department)
of Fish and Game of the)
State of California,)

No. 10434

JUDGMENT AND ORD

Petitioner,)

vs.)

5 GILL NETS, etc.,)

Respondent.)

The petition of G. Raymond Arnett, as Director of the Department of Fish and Game of the State of California, the petitioner named in the above entitled action, praying for a judgment of this court adjudging 5 Gill Nets (white gill net 70 feet long, nine inch mesh with lead line and 19 wooden floats; green gill net 50 feet long, nine inch mesh with lead line and 26 wooden floats; green gill net 38 feet long, six inch mesh with lead line and 10 black plastic floats; white gill net 50 feet long,

nine inch mesh with lead line and 18 plastic floats; beige gill net 50 feet long, six inch mesh with lead line and ten plastic floats), the respondents herein, to be public nuisances, and for an order declaring the same to be forfeited, and directing the destruction or sale of the whole or any part thereof, coming on May 14, 1970, regularly to be heard, the said petitioner being represented by his attorney, Ronald V. Thunen, Jr., Deputy Attorney General, and the intervenor, Raymond Mattz, being represented by his attorney, Robert J. Donovan; and

This court having issued its opinion and decision on July 6, 1970, and its findings of fact and conclusions of law on September 4, 1970; and

It further appearing to this court and the court so finds, that due and proper notice of the hearing of said petition was given by the clerk of this court, in the manner prescribed by law, and in accordance with the order of this court, and that due and legal proof thereof has been made therein to the satisfaction of this court. This court having concluded that respondent nets are contraband and are subject to forfeiture pursuant to sections 8686 and 8630 of the Fish and Game Code,

Now, therefore, IT IS ORDERED, ADJUDGED AND DECREED that said respondent more particularly described as white gill net 70 feet long, nine inch mesh with lead line and 19 wooden floats; green gill net 50 feet long, nine inch mesh with lead line and 26 wooden floats; green gill net 38 feet long, six inch mesh with lead line and 10 black plastic floats; white gill net 50 feet long, nine inch mesh with lead line and 18 plastic floats; beige gill net

50 feet long, six inch mesh with lead line and ten plastic floats, public nuisances, that the same be and are hereby forfeited, and the same are directed to be destroyed or soold in accordance with law; Provided, however, that said destruction or sale shall not be accomplished until such time as this judgment may become final.

DATED: Sept. 4, 1970

FRANK S. PETERSEN
JUDGE OF THE SUPERIOR COURT

APPENDIX C

CLERK'S OFFICE SUPREME COURT
4250 State Building

San Francisco, California 94102

Dec. 16, 1971

Dear Sir: I have this day filed Order

HEARING DENIED

In re: 1 Civil No. 29109

Arnett

vs.

5 Gill Nets

Respectfully,

G.E. Bishel
Clerk

APPENDIX D

18 U.S.C. § 1151 (62 Stat. 757,
as amended by 63 Stat. 94)

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1162 (67 Stat. 588,
as amended by 84 Stat. 1358)

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or
Territory of

Indian country affected

Alaska.....All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended

California.....All Indian country within the State

Minnesota.....All Indian country within the State, except the Red Lake Reservation

Nebraska.....All Indian country within the State

Oregon.....All Indian country within the State, except the Warm Springs Reservation

Wisconsin.....All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty,

agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

Act of June 17, 1892, 27 Stat. 52

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: Provided, That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: Provided,

That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first in order of time: Provided, That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: And provided further, That the heirs of any deceased settler shall succeed to the rights of such settler under

this act: Provided further, That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

ORIGINAL

Supreme Court, U. S.

FILED

JUN 22 1972

MICHAEL RODAK, JR., CL

In the Supreme Court of the
United States

OCTOBER TERM, 1971

No. 71-1182

G. RAYMOND ARNETT, as Director of the Department
of Fish and Game of the State of California,

Plaintiff and Respondent,

vs.

5 GILL NETS, etc.,

Defendant,

RAYMOND MATTZ,

Intervenor and Petitioner.

Respondent's Reply Brief

EVELLE J. YOUNGER

Attorney General of the State of
California

CARL BORONKAY

Assistant Attorney General

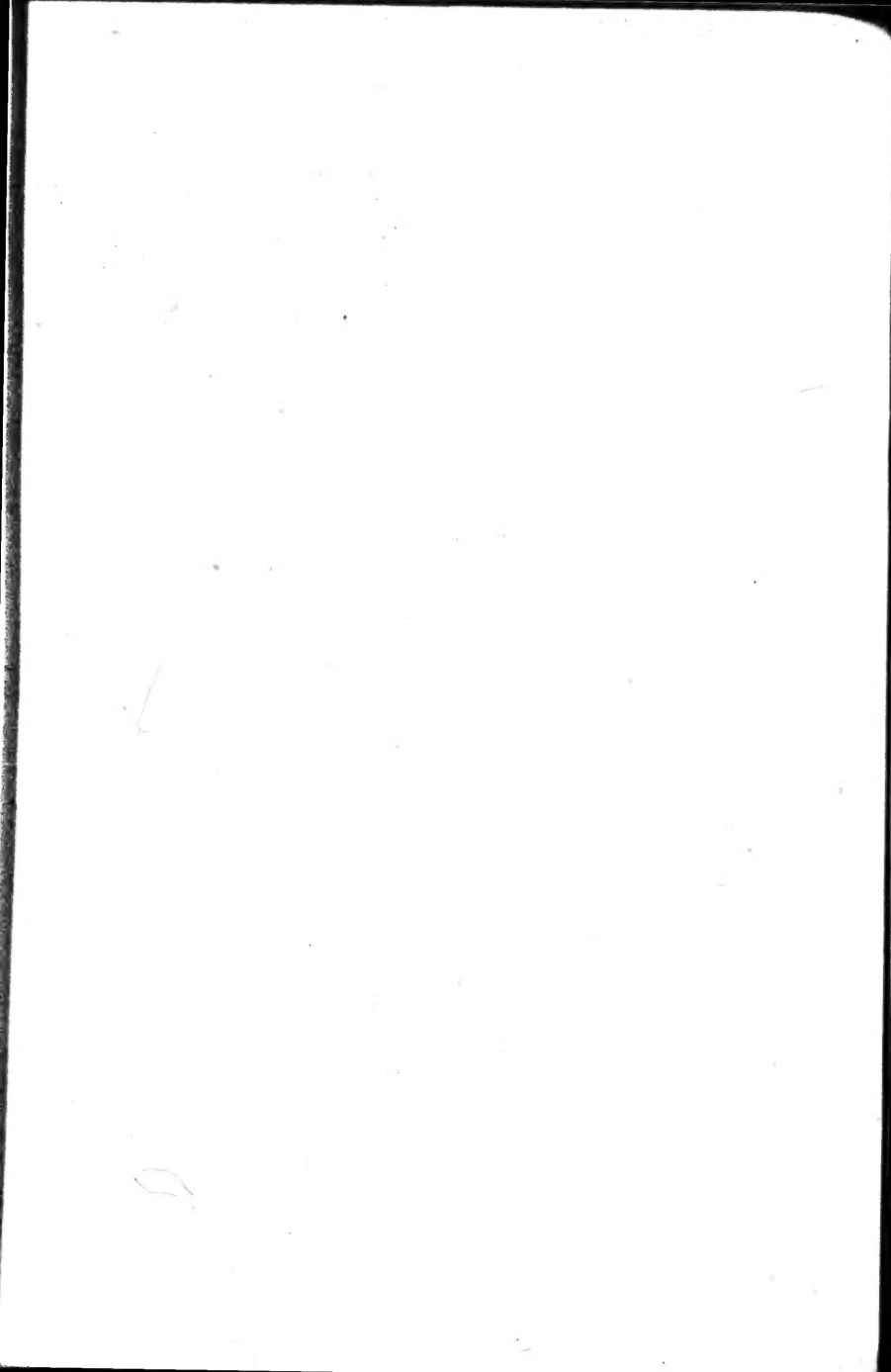
RODERICK WALSTON

Deputy Attorney General

6000 State Building

San Francisco, California 94102

Attorneys for Respondent



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In the Supreme Court of the United States

OCTOBER TERM, 1971

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G. RAYMOND ARNETT, as Director of the Department
of Fish and Game of the State of California,
Plaintiff and Respondent,

vs.

5 GILL NETS, etc.,

Defendant,

RAYMOND MATTZ,

Intervenor and Petitioner.

Respondent's Reply Brief

The Respondent's Reply Brief is submitted herewith in response to the U. S. Supreme Court Clerk's request for such a brief.

I.

STATEMENT OF THE FACTS

This is an action by the Director of the Department of Fish and Game for the State of California (hereinafter the "Director") to forfeit fish nets owned by the intervenor, Raymond Mattz, on grounds that the nets were used in violation of California's fishing laws. The intervenor claims that he is not subject to California's fishing laws by virtue of section 1162 of Title 18 of the United States Code. Under that section, California is given jurisdiction over all offenses committed by Indians within the

State, except (a) those committed in "Indian country," or (b) those falling within the protective ambit of a "Federal treaty, agreement or statute." "Indian country" is defined in section 1151 to include a "reservation."

The Superior Court in California held that the land on which the nets were seized was not "Indian country" within the meaning of section 1151, and on that basis ordered the forfeiture of the nets. The court did not reach the question of whether the intervenor's fishing activities were protected by a "Federal treaty, agreement or statute." The California Court of Appeal upheld the lower court's order, and, after the California Supreme Court denied the intervenor's petition for a hearing, the intervenor filed this petition for a writ of certiorari.

The intervenor claims that the area in which the nets were seized, which is now privately owned, constitutes a "reservation," and hence is "Indian country." The history of the area reveals otherwise. The nets were seized in what was formerly the Klamath River Reservation, a reservation established in 1855 to include an area one mile wide on each side of the Klamath River from its mouth to a point approximately 20 miles upstream. The reservation was terminated under legislation enacted in 1864. At approximately the same time, the Hoopa Valley Indian Reservation (hereinafter the "Hoopa reservation") was created to include a 12-mile square area on the upper Klamath River. An executive order was issued in 1891 extending this reservation to include an area one mile wide on each side of the Klamath River from its mouth to the Hoopa reservation, a distance of roughly 40 miles. This extension, of course, included the old Klamath River Reservation. But this latter reservation was again terminated, we believe, by a congressional enactment in the following year, 1892. 27 Stat. 52.

The 1892 enactment decreed that lands in "what was [the] Klamath River Reservation" were to be opened for public purchase. Specifically, the lands were to be subject to entry, settlement and purchase under the homestead laws and the laws authorizing the sale of mineral, stone and timber lands. A proviso established the right of Indians residing on the lands to apply for allotments under the General Allotment Act of 1887. Proceeds from the sale of the lands were to be used for the maintenance and education of Indians then residing on the land, a provision which was amended in 1917 to expand the Indian benefits thereunder. 39 Stat. 969, 976.

II.

THE PENDING MATTER IS DISTINGUISHABLE FROM THE MATTER BEFORE THE SEYMOUR COURT RELATING TO THE 1906 ACT AFFECTING THE SOUTHERN HALF OF THE COLVILLE RESERVATION.

The intervenor asserts that the 1892 enactment did not have the effect of terminating the reservation status of the old Klamath River Reservation. The intervenor principally relies on the decision of the United States Supreme Court in *Seymour v. Superintendent*, 368 U.S. 351 (1962). In that case, Congress had passed legislation in 1892 which, according to the Court, terminated the reservation status of the northern half of the Colville Indian Reservation (hereinafter the "Colville reservation") in Washington. 27 Stat. 62. The southern half of the reservation was expressly unaffected by the legislation. In 1906, Congress passed additional legislation which (1) gave allotments to Indians "belonging to or having tribal relations on" the southern half of the diminished reservation, (2) provided that the "surplus lands" thereon were to be opened to settlement and entry under the homestead laws and sold under the mining laws, and (3) provided that the proceeds from the sale of such lands were to be used for the benefit of the Indians residing on the reservation.

The *Seymour* Court held that the 1906 enactment did not terminate the reservation status of the southern half of the diminished Colville reservation. The main reason for this conclusion, the Court declared, is that the language of the enactment, particularly the repeated references to the "diminished Colville Indian Reservation," made it clear that Congress intended for the diminished reservation to continue in effect. No similar language is contained in the 1892 enactment which, we believe, terminated the old Klamath River Reservation. For instance, the 1906 legislation directs that proceeds from land sales are to go to Indians on the "Colville Indian Reservation," but the 1892 legislation concerning the old Klamath River Reservation directs that similar proceeds are to go to Indians residing on the "lands" affected by the legislation. In fact, the 1892 enactment specifically refers to "lands in what *was* [the] Klamath River Reservation," thus directly implying that its reservation status is to cease. [Emphasis added.]

The *Seymour* Court also relied upon less persuasive facts to support its conclusion. The Court noted that the proceeds of the land sales were to be deposited in the U. S. Treasury for the use of the Indians remaining on the reservation. This procedure is essentially similar to the disposition of such proceeds under the 1892 enactment relating to the old Klamath River Reservation. But it is also largely similar to the procedure for disposing of such proceeds under the 1892 enactment terminating the reservation status of the northern half of the Colville reservation. This enactment provided that such proceeds should be set aside in the U. S. Treasury, and that, although Congress could ultimately appropriate them for the public use, the proceeds in the meantime were to be used for the benefit of the Indians. Since the *Seymour* Court held that this latter enactment effectively dissolved the northern

half of the Colville reservation, it is apparent that the use of such proceeds for the Indians' benefit is a factor that, although subject to consideration, is not of critical or even substantial significance.

The *Seymour* Court also noted that, beginning 10 years after the 1906 enactment concerning the Colville reservation, in 1916, legislation enacted by Congress frequently referred to the diminished Colville reservation in a manner that suggests that the reservation was to continue in effect.¹ But the only congressional reference cited by the intervenor relating to the Klamath River Reservation consists of a 1958 enactment. See 72 Stat. 121.² Such a congressional utterance has little bearing on the composition of the congressional mind 66 years earlier. In fact, this Court has recently indicated that congressional action or inaction is of little significance in ascertaining the congressional intent behind an earlier enactment, particularly where the enactment is remote in time. See *United States v. Wise*, 370 U.S. 405 (1962).

III.

THE PENDING MATTER CLOSELY RESEMBLES THE MATTER BEFORE THE SEYMOUR COURT RELATING TO THE 1892 ACT AFFECTING THE NORTHERN HALF OF THE COLVILLE RESERVATION.

Perhaps the distinction between the pending matter and the matter before the *Seymour* Court can be illuminated more clearly by focusing on the 1892 enactment concerning the northern half of the Colville reservation. That enactment, which the *Seymour* Court held to have effec-

1. The Court cited eight such references. See 368 U.S. at p. 356, n. 12.

2. The intervenor also cited a 1942 act that alluded to allotments on the "Klamath River Reservation." 25 U.S.C.A. § 348a. However, the context shows that the allusion was merely intended to identify the allotments, not to otherwise suggest that the land on which the allotments were located was a reservation.

tively discontinued the reservation on the northern half, is virtually identical to the 1892 enactment concerning the old Klamath River Reservation. Both provided for entry and settlement of unallotted lands under the homestead laws. Although the enactment concerning the northern half of the Colville reservation contained additional language that such land was "restored to the public domain," the effect of both enactments was identical; under the homestead laws, land was similarly restored to the public domain under the enactment concerning the old Klamath River Reservation. Both pieces of legislation also provided that the proceeds from the disposition of these lands would be used for the Indians' benefit, although as noted earlier the Colville legislation reserved the right of Congress to eventually use these proceeds for the public benefit. Both enactments provided that Indians "residing" on the respective lands could secure allotments under the General Allotment Act of 1887, thus authorizing the federal government to act as trustee for lands which were eventually to be turned over to the Indians in fee simple. By way of contrast, the 1906 enactment concerning the southern half of the Colville reservation made allotments available to any Indian "belonging to or having tribal relations" on the reservation, not just to those residing on the reservation.

Moreover, the 1906 enactment set aside additional property for administrative, educational and religious purposes of the Indians, thus suggesting that some of the traditional functions of a reservation were expected to continue. Neither of the 1892 enactments contained similar provisions. Indeed, both 1892 enactments were, of course, passed by the same Congress, the Fifty-Ninth, within two weeks of each other. That the same Congress enacted virtually identical provisions, employing similar language,

is strongly persuasive that it intended to achieve a similar result, which in this case would be the termination of both reservations.

It may be asked, why did the *Seymour* Court conclude that the 1906 enactment affecting the southern half of the Colville reservation did not similarly terminate that portion of the reservation? The answer, it clearly appears, is that the 1906 legislation contained language amply indicating that the reservation was expected to continue in effect. However, no such language is found in the 1892 enactment concerning the old Klamath River Reservation, and indeed the enactment referred to the reservation in the past tense and thus amply indicated that the reservation was not expected to survive the enactment.

The practical effect of the 1892 legislation was to bring to a halt the traditional tribal cohesion on the old Klamath River Reservation. The legislation opened up the old reservation to a flood of non-Indian settlers under the homestead laws. Certainly the area lost its resemblance to the neighboring extension located on the upper 20 miles of the Klamath River, where non-Indian settlers continued to be excluded and where the land continued to be set aside for the Indians. Since the traditional functions of a reservation continued in one area but not the other, it is difficult to believe that Congress intended that both areas would continue to be similarly regarded as reservations. The California Court of Appeal recognized this proposition in 1966, when it declared in dictum that the old reservation "for all practical purposes, almost immediately lost its identity as part of the Hoopa Valley Reservation." *Elser v. Gill Net Number One*, 246 Cal.App.2d 30, 34 (1966). Surely this was the logical consequence of the 1892 enactment that Congress expected.

CONCLUSION

The congressional intent behind the 1892 enactment was to discontinue the historic functions of the old Klamath River Reservation, in the same manner that an act of the same year discontinued the functions of the northern half of the Colville reservation. The Indians were to be protected by being allowed to secure individual allotments, and to receive the benefit of the proceeds from the sale of the remaining land. But the reservation, operationally and legally, ceased to exist.

California has no interest in whittling away the rights of Indians which are secured under federal law. But California has the constitutional obligation to apply its laws uniformly to all persons in its jurisdiction, in the absence of conflicting federal law, and these laws must be applied to Indians as to others. In recognition of the special cultural and economic problems of Indians now residing on the land of the former Klamath River Reservation, California has relaxed its fishing standards applicable to such Indians. See California Fish and Game Code § 7155. But to ignore these standards altogether, as to the Indians or to others, would be to jeopardize California's efforts to conserve the vital and irreplaceable fishery resource in the Klamath River. The Court should deny the intervenor's petition.

Dated: June 21, 1972

Respectfully submitted,

EVELLE J. YOUNGER

Attorney General of the State of
California

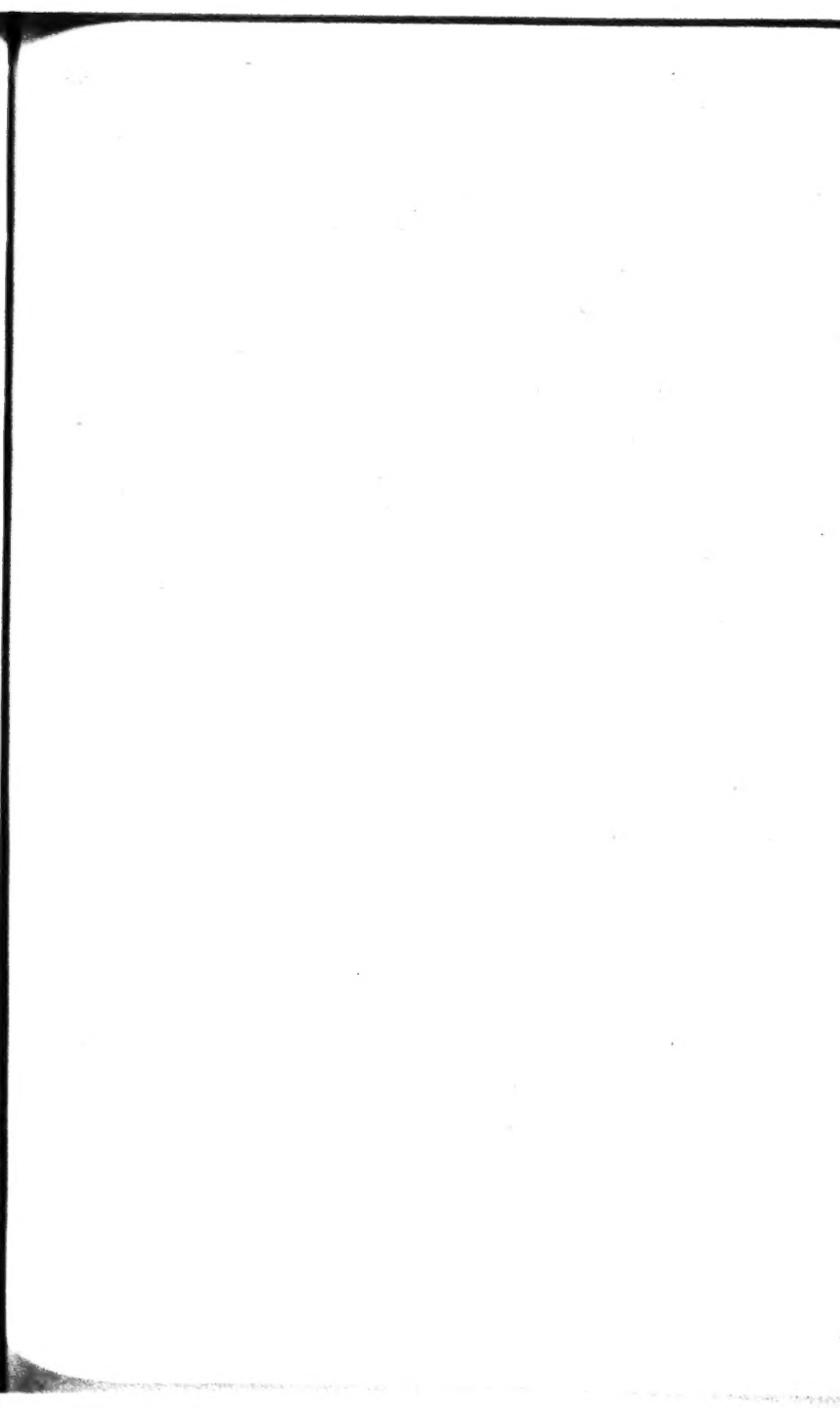
CARL BORONKAY

Assistant Attorney General

RODERICK WALSTON

Deputy Attorney General

Attorneys for Respondent



FILE COPY ORIGINAL

Supreme Court U. S.
FILED

JUN 29 1972

RECEIVED DEPT. OF JUSTICE

In Re

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71 - 1182

RAYMOND MATTEI,

Petitioner

v.

G. RAYMOND ARNETT,

Respondent

Supplemental and Reply Brief

Lee J. Solar
William F. Lamb
Robert J. Donovan
CALIFORNIA INDIAN LEGAL SERVICES
2527 Dwight Way
Berkeley, California 94704

Attorneys for Petitioner

SUPPLEMENTAL AND REPLY BRIEF

BASIS FOR BRIEF

This brief is based on a new decision and the need to correct misstatements in respondent's brief.

I.

THE NATIONAL ATLAS SHOWS THE LOWER
TWENTY MILES OF THE KLAMATH RIVER
TO BE WITHIN AN INDIAN RESERVATION

The National Atlas is the official atlas of the United States. Published by the Department of the Interior in 1970, the National Atlas shows the entire Hoopa Extension--from the Pacific Ocean to the Hoopa Square--as within the nation's Indian reservations. (Sheet 272.) The lower twenty miles of the Extension, which is the subject of this lawsuit, is part of that reservation area.

II.

A COURT OF CLAIMS COMMISSIONER HAS RULED
THAT THE LOWER TWENTY MILES OF THE
HOOPA EXTENSION IS PART OF A RESERVATION

Jessie Short v. United States is a Court of Claims proceedings (No. 102 - 63) to determine whether Indians of the Hoopa Extension are entitled to share in proceeds from timber sales on the Hoopa Square. The main issue in that case is whether the Extension and the Square are one reservation.

On May 22, 1972, a Court of Claim's commissioner ruled that the Extension and

the Square were one reservation.¹ The commissioner then ruled that the lower twenty miles were part of that reservation. (Slip Opinion at 111.) People born on the lower twenty after 1892 were held to have been born on the reservation. (Slip Opinion at 115 (¶ 209), 116 (¶¶ 213, 214).)

The commissioner's ruling is in accord with petitioner's view of the act of June 17, 1892, and totally inconsistent with the State's view.

III.

RESPONDENT HAS MISSTATED THE BASIS FOR THE SEYMOUR DECISION

According to respondent's brief (pp. 5 -6), Seymour v. Superintendent, 368 U.S. 351 (1962) held that reservation land is restored to the public domain if it is opened to non-Indian homesteading. What this court actually ruled in Seymour is that without an express change in status from reservation to public domain, the availability of reservation land for non-Indian homesteading does not place that land in the public domain. Thus the North Half of Colville became public domain under the 1892 Act while the South Half, also opened to non-Indian homesteading but not expressly restored to the public domain, remained a reservation under the 1906 Act.

1. The Court need not decide in this case if the Extension is part of the Hoopa Reservation. Whether the Hoopa Extension is a reservation or part of a reservation, it is Indian Country withing the meaning of 18 U.S.C. §§1151 and 1162.

The 1892 Hoopa Extension law contains no language changing the status of the lower twenty miles of that reservation (formerly the Klamath River Reservation) to public domain. Like the 1906 Colville Act, the 1892 Hoopa Extension law merely authorized sale of unallotted lands under the public land laws.

Respondent also misrepresents Seymour's holding on proceeds from the sale of "surplus" lands. Seymour found a fundamental difference between the 1906 Colville Act which reserved the proceeds only for the Indians and the 1892 Colville Act which took the proceeds for public use but allowed, pending Congressional appropriation, interim Interior Department use for Indians. The 1906 disposition of the proceeds indicated that the Government was to act as trustee for reservation lands rather than as broker for its own property. The 1892 Hoopa Extension Act also made Indians the sole beneficiaries.

IV.

RESPONDENT'S BRIEF CONTAINS NUMEROUS ERRONEOUS STATEMENTS

Respondent's brief states:

"[T]he 1892 enactment specifically refers to 'lands in what was [the] Klamath River Reservation,' thus directly implying that its reservation status is to cease." (p. 4)

That brief, acknowledges, however, the inaccuracy of the contention. It states (p. 2): "The (Klamath River) res-

ervation was terminated under legislation enacted in 1864." (See also Petition for Certiorari at 3-4.)

The Court of Claims commissioner fully explained in Jessie Short v. United States, supra, why the phrase "what was [the] Klamath River Reservation" was used to describe the lower twenty miles of the Extension.

"Almost immediately following the executive order [of 1891], Congress on June 17, 1892 enacted a bill for the allotment of lands on the Klamath River Reservation, to be followed by the public sale of the remaining land, the proceeds of sale to be a fund for the benefit of the Indians of the reservation (finding 77, supra). Bills of this nature had been considered for many years on the premise that the Klamath River Reservation was abandoned (see findings 50-77, supra); the proponents were not about to make their cause less attractive by amending the name of the reservation to be sold to call it the former Klamath River Reservation, now part of the Hoopa Valley Reservation."

Respondent also errs when it says:

"The practical effect of the 1892 legislation was....[that] the area lost its resemblance to the neighboring extension located on the upper twenty miles of the Klamath River.... [T]he traditional functions

of a reservation continued in
one area but not the other...."
(p. 5)

The record contains no evidence to support that statement and the law is to the contrary. The 1892 Act provided for the Secretary to reserve Indian villages on the lower twenty from homesteading just as the 1906 Colville Act directed the Secretary to reserve lands necessary for agency, school and religious purposes. In Jessie Short the commissioner found eight Indian villages on the lower twenty. (Slip Opinion at 111.)

Finally, the record is completely barren of any substantiation for respondent's contention that traditional Indian fishing such as petitioner engaged in (petition for certiorari at 9) would jeopardize the "vital and irreplaceable fishing resource in the Klamath River." All the fisheries in California thrived under Indian control; it is non-Indians who are responsible for the dams, pollution, road construction, and overfishing that imperil California's fish resource.

CONCLUSION

The Court should grant a writ of certiorari in this case.

Dated: June 27, 1972

Respectfully submitted

Lee J. Sclar
William P. Lamb
Robert J. Donovan
CALIFORNIA INDIAN LEGAL SERVICES

By


Lee J. Sclar

DEC 26 1972

MICHAEL SODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1182

G. RAYMOND ARNETT, as Director of the Department
of Fish and Game of the State of California,
Plaintiff and Respondent,

vs.

5 GILL NETS, etc.,

Defendant,

RAYMOND MATTZ,

Intervenor and Petitioner.

Respondent's Supplemental Reply Brief

EVELLE J. YOUNGER

Attorney General of the State of
California

CARL BORONKAY

Assistant Attorney General

RODERICK WALSTON

Deputy Attorney General

6000 State Building

San Francisco, California 94102

Attorneys for Respondent



In the Supreme Court of the United States

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of Fish and Game of the State of California,

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vs.

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Defendant,

RAYMOND MATTZ,

Intervenor and Petitioner.

Respondent's Supplemental Reply Brief

The respondent respectfully submits this supplemental reply brief to the Court under Rule 24, in the expectation that the brief will provide further information to the Court in acting upon the intervenor's petition for writ of certiorari.

I.

**THE CONGRESSIONAL HISTORY SURROUNDING THE 1892 ACT
INDICATES THAT THE KLAMATH RIVER RESERVATION WAS
NOT EXPECTED TO SURVIVE THE ACT.**

The respondent contends that the former Klamath River Reservation, which was located on the lower twenty miles

of the Klamath River, ceased to be a reservation by virtue of a congressional enactment in 1892. See 27 Stat. 52. This enactment, which provided for entry, settlement and purchase of the lands of the former reservation, was based on a bill introduced into the House of Representatives, H.R. 38. The congressional history surrounding the bill strongly supports the position of the respondent.

H.R. 38 was accompanied by a House report, Report No. 161. This report stated in part,

"The land referred to in the bill under consideration was set apart as an Indian reservation by an Executive order dated November 16, 1855. *It has not, in fact, been used by the Government as a reservation since the winter of 1861-62. . . .*

"[T]his reservation, under the provisions of the act of Congress just referred to, became abandoned in law, as it has been in fact, since the winter of 1861-62.

. . .
 "As this land does not constitute an Indian reservation, and has not been used as such for about twenty-eight years, there does not appear to be any reasonable objection to the passage of the present bill

"[T]his bill simply proposes that the land formerly set apart as a reservation, but now abandoned as above stated, shall be disposed of, as are other lands of the same class or quality, under the general laws of the United States, giving to those who have settled upon them in good faith the prior right to enter that portion upon which settlement has been made.

"The few Indians now on this tract, variously estimated to be from fifty to one hundred in number, occupy small villages at or near the mouth of Klamath River. . . .

"These Indians have not, since the abandonment of this reservation, been in any manner cared for, aided or instructed in the ways of civilization by the Government. This duty the Government may hereafter desire to perform, and to this end, and as a matter of justice

to these Indians and their children, we think the proceeds to be derived from the sale of these lands should constitute a fund to be used for their removal, maintenance, and education, when in the judgment of the Secretary of the Interior their interests require an expenditure for such purpose." H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892). (Emphasis added.)

The bill was originally considered in the House. The bill's spokesman, Representative Geary, stated during the House debates, in urging the bill's passage,

"The land embraced in this bill was originally an Indian reservation. *In 1861 it was abandoned, and never since has been used for that purpose. Since 1868 it has been occupied by settlers,* and this merely authorizes the Land Department to enable them to acquire title to the land which they occupy. . . .

"All the land in this reservation has been taken up by settlers. . . . The land is all occupied, and the settlers have filed their claims, but the Land Department cannot take action on them until Congress passes this act." 23 Cong. Rec. 1598-99 (1892). (Emphasis added.)

After passage in the House, the bill was sent to the Senate. The spokesman for the bill in the Senate, Senator Felton, declared during the senate debate,

"The Klamath Indian Reservation was set apart by a proclamation of the president some twenty years ago, I think. . . . *It never has been used as an Indian reservation. . . .*"

"There is an Indian reservation within 20 miles of the river, where these Indians can go if they want to do so. The number is variously estimated at from 40 to 60 Indians. . . .

"The bill makes provision for them to select allotments in severalty; and if they have Indian villages, which they have not, it allows them to retain those,

and it gives them a year's time within which to make selections. . . .

"There are a great many settlers upon that land. It is not practically an Indian reservation. It never has been used for that purpose. The provisions of the bill open the land to settlers after providing, as I stated before, in regard to the Indians, and lands more valuable for timber or mineral deposits shall be entered under the timber act and the mineral land laws. . . . A few of these Indians live at the mouth of the river. . . ." 23 Cong. Rec. 3918-19 (1902). (Emphasis added.)

Thus, it is eminently clear that Congress, in passing the bill, did not expect that the lands on the former Klamath River Reservation should continue to have reservation status. Indeed, Congress did not even regard these lands as having such status prior to the bill's passage. Based on the House report and the statements of the bill's spokesmen, Congress understood that the reservation was "abandoned," and that the land thereon "does not constitute an Indian reservation." Whether the land was a reservation immediately prior to the bill's passage is arguable, since an 1891 executive order suggests that such a reservation might have been created by the order. See I Kappler, *Indians Affairs: Laws and Treaties* 815. But the status of these lands prior to the 1892 act is not relevant. What is relevant is that Congress, in understanding these lands not to have reservation status prior to the act, clearly did not intend for these lands to have such status thereafter. Therefore, if the lands were a reservation prior to the act, they ceased to be a reservation by virtue of the act.

Such congressional history shows that the 1892 act was passed in order to open up the lands of the former reservation for entry and settlement by non-Indians. According to this history, most of the land was occupied by the many

settlers who wished to own and develop their holdings. The land no longer functioned as a reservation, Congress was informed, and the few Indians on the land were to be protected by allotments which would enable them to similarly own and develop their holdings. Therefore, the 1892 act was intended to promote the development by non-Indians of lands on a "former," "abandoned" reservation. This congressional intention is inconsistent with a continuation of the reservation status of these lands. Hence, if the reservation existed prior to the act, it was certainly repealed by the act.

II.

A 1909 MAP, AS WELL AS CURRENT MAPS, ISSUED BY THE FEDERAL GOVERNMENT INDICATE THAT THE LOWER TWENTY MILES OF THE KLAMATH RIVER IS NO LONGER CONSIDERED A RESERVATION.

The executive branch of the federal government apparently took the position in 1909 that the 1892 act terminated the reservation status of the former Klamath River Reservation. President Theodore Roosevelt issued a proclamation that year which altered the boundaries of the Trinity National Forest in California. Two maps, compiled by the Forest Service of the U. S. Department of Agriculture, were affixed to the proclamation. See Sen. Doc., Vol. 27, 62d Cong. 2d Sess. (3 Indian Affairs: Laws and Treaties) 646-49 (1909).¹ These maps, particularly the small scale map (*id.* at 648), show the boundaries of an area covering the *upper* twenty miles of the Klamath River, which is described thereon as the "Hoopa Valley Indian Reservation." Significantly, a boundary line is clearly drawn on the maps at the northern end of this extension of the Hoopa Valley

1. A copy of this proclamation is appended hereto as Appendix 1.

Reservation. This line differentiates this reservation extension from the *lower* twenty miles of the river, which is the location of the former Klamath River Reservation. Therefore, the maps unequivocally indicate that the reservation status accorded to the upper twenty miles of the river is not similarly accorded to the lower twenty miles. The particular significance of the maps is that, by virtue of their compilation in 1909, they are fairly contemporaneous to the 1892 act. Also, since the maps were incorporated in a presidential proclamation, they represent an expression by the highest executive officer in the federal government.

The 1909 maps are not the only cartographic expressions by the federal government concerning the status of the former Klamath River Reservation. To the contrary, the Geologic Survey unit of the U. S. Department of the Interior has published many maps which similarly show a boundary line limiting the extension of the Hoopa Valley Reservation to the upper twenty miles of the river.² These maps are based on the "15 Minute Series (Topographic)" map of the Geologic Survey for the Tectah Creek Quadrangle.³ This latter map, compiled by the Army Corps of Engineers, clearly establishes the boundary of the reservation extension at a point approximately twenty miles upstream, and thus excludes the former Klamath River Reservation from the reservation extension. Therefore, the federal government continues to regard the lower twenty miles of the Klamath River as having lost its reservation status.

2. These maps, which are large and cumbersome, will be made available to the Court, if the Court wishes.

3. A copy of this map is appended hereto as Appendix B. For purposes of legibility, the boundary line has been retraced in heavy pencil prior to the photocopying process.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated: December 22, 1972

Respectfully submitted,

EVELLE J. YOUNGER

Attorney General of the State of
California

CARL BORONKAY

Assistant Attorney General

RODERICK WALSTON

Deputy Attorney General

Attorneys for Respondent

Mar. 2, 1909.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
A PROCLAMATION

Proclamations.
16 Stat., Part 2, 2243.

Trinity National Forest,
Cal.
Proclamation.
16 Stat., Part 1, 3235.

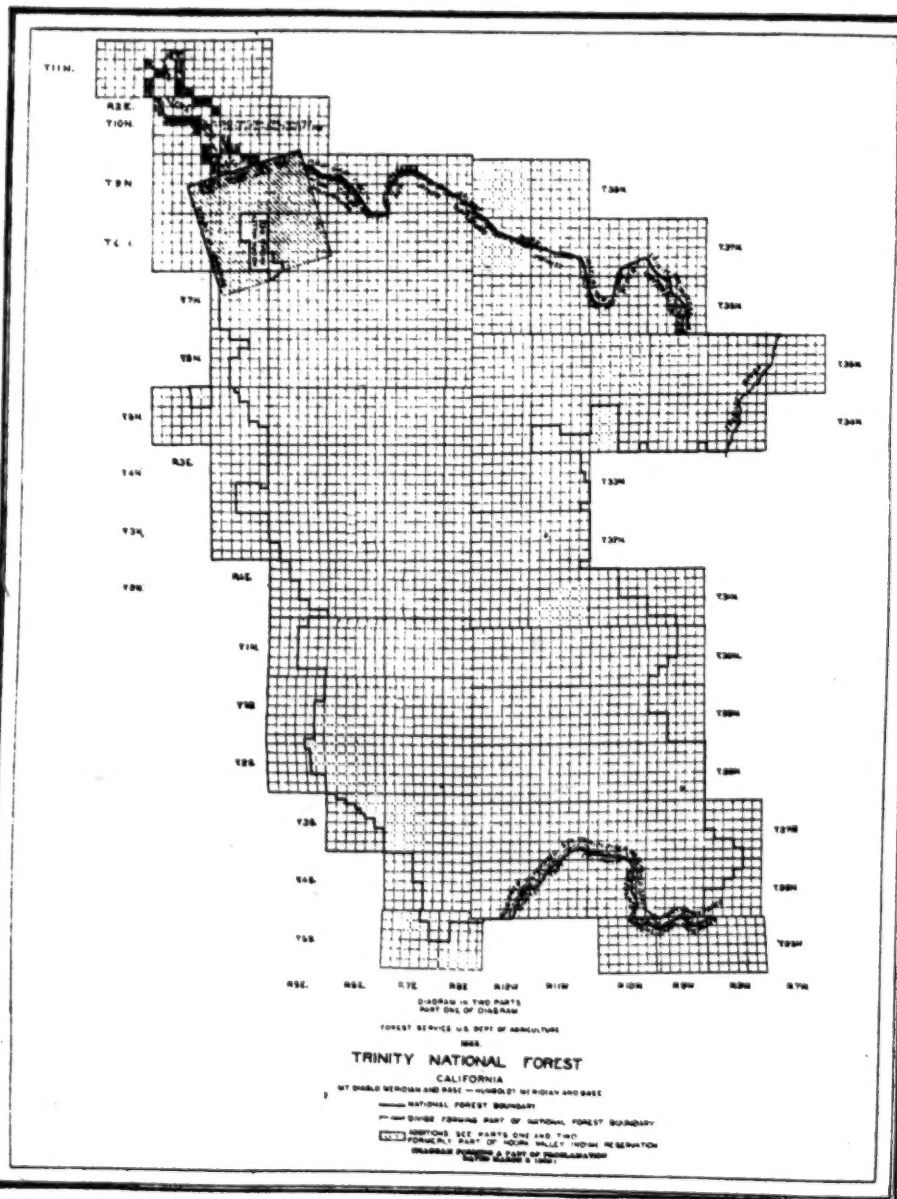
WHEREAS, an Executive Order dated July second, nineteen hundred and eight, changed the boundaries of the Trinity National Forest to embrace portions of the Trinity, Shasta, Klamath, and Stony Creek National Forests;

And whereas, it appears that the public good will be promoted by including in the Trinity National Forest certain lands within the State of California, shown on the diagram hereto attached and forming a part hereof, which are in part covered with timber, and which constitute a part of the Hoopa Valley Indian Reservation, established by Executive Order dated June twenty-third, eighteen hundred and seventy-six, and modified by subsequent Orders;

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by the Act of Congress, approved June fourth, eighteen hundred and ninety-seven, entitled, "An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen

Boundaries enlarged.
26 Stat., 1103.

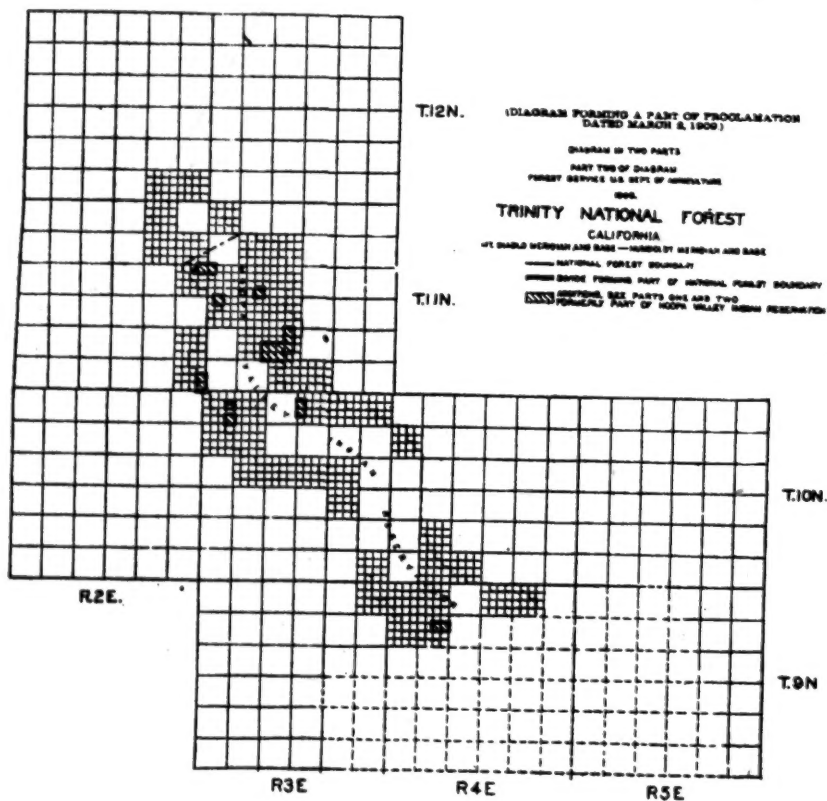
hundred and ninety-eight, and for other purposes," do proclaim that the said lands are hereby added to the Trinity National Forest and that the boundaries of said National Forest are now as shown on the two parts of the said diagram, and such National Forest so enlarged



shall, except as hereinafter provided, be subject to all the laws affecting National Forests, including the mineral land laws of the United States; *Provided*, that nothing herein shall, for the term of twenty-five years from the date hereof, operate to terminate or abridge the

Province.
Use for Indians.

rights of the Secretary of the Interior and of the Commissioner of Indian Affairs, under existing laws, to allot to individual Indians any of such of the above described lands as were included in the said Hoopa Valley Indian Reservation by the said Executive Order modified as aforesaid; to use any of such lands or the timber thereon for Agency, school, or other tribal purposes; to permit the use of any of such lands for grazing purposes; to permit the free use by individual Indians of timber and stone from any of said lands necessary for domestic use upon their allotments; to dispose of the proceeds arising from grazing as provided for by law for other Indian



Regulations, etc.

funds; and to dispose of the dead timber standing or fallen upon such lands; *Provided further*, that said powers and rights of the Secretary of the Interior and Commissioner of Indian Affairs or permittees under or through them or either of them, and of individual Indians, except as to allotments to such Indians, shall be subject to such rules and regulations as the Secretary of Agriculture may from time to time prescribe for the protection of the National Forest; and said powers and rights shall not be construed to apply to any land except such parts of said Hoopa Valley Indian Reservation as are included in the Forest by this proclamation, and all said powers and rights

cept the rights of individual Indians and their heirs to hold and enjoy their allotments, shall cease and determine twenty-five years after the date hereof, and thereafter the occupancy and use of the allotted parts of said lands shall in all respects be subject to the laws governing National Forests.

The withdrawal made by this proclamation shall, as to all lands which are at this date legally appropriated under the public land laws reserved or used for Indian Agency, school, or church purposes, reserved for any public purpose other than for Indian occupancy and use under such Executive Orders, be subject to, and shall not interfere with, or defeat legal rights under such appropriation, or prevent the use for such public purpose of lands so reserved, so long as such appropriation is legally maintained, or such reservation remains in force.

Prior rights not affected.

This proclamation shall not prevent the settlement and entry of lands heretofore opened to settlement and entry under the Act of Congress approved June eleventh, nineteen hundred and six, entitled, "An Act to provide for the entry of Agricultural lands within forest reserves."

Agricultural lands.
34 Stat., 233.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this second day of March, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-third

THEODORE ROOSEVELT

By the President:

ROBERT BACON

Secretary of State.

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JAN 8 1973

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71 - 1182

RAYMOND MATTZ,

Petitioner

v.

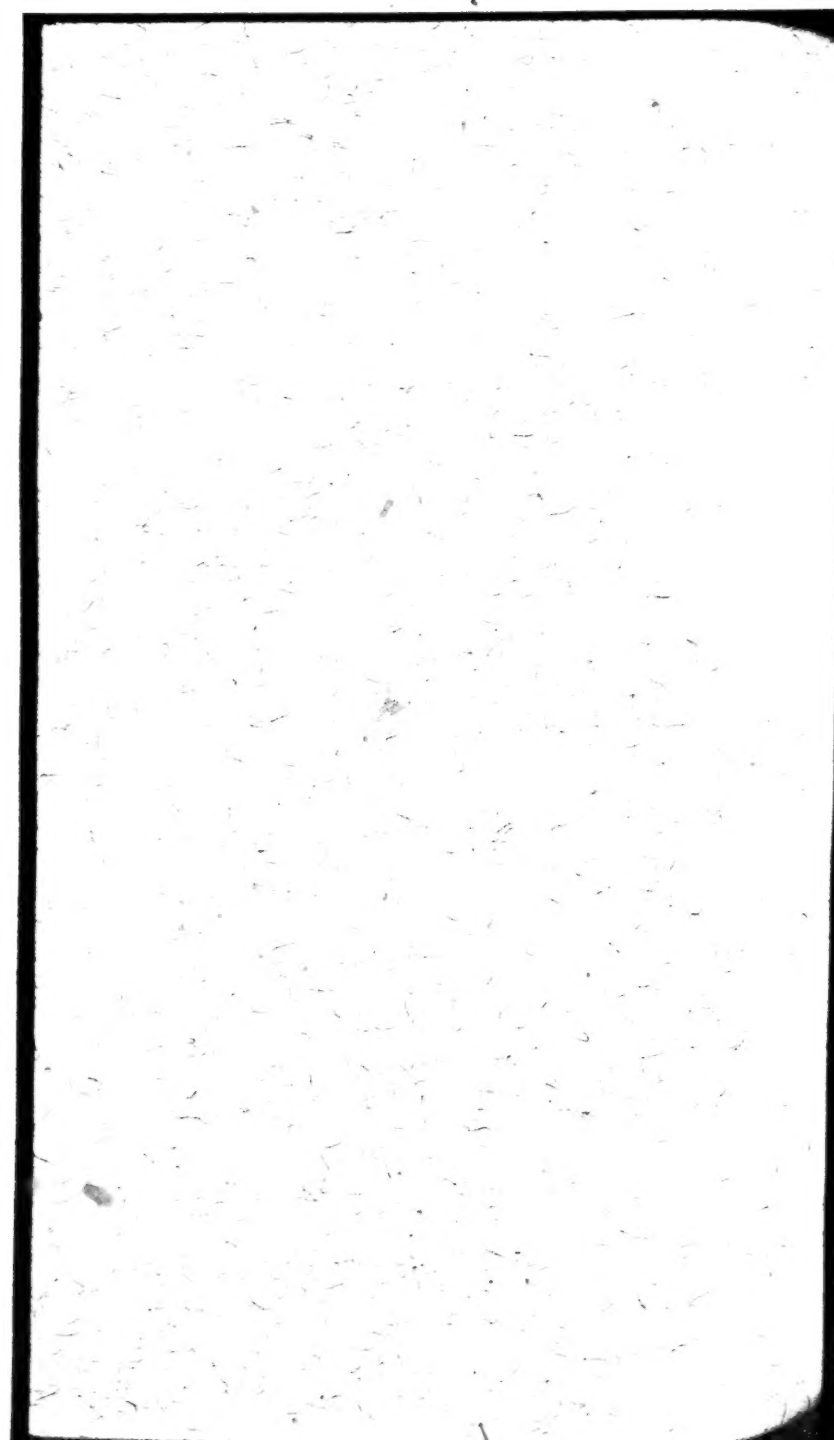
G. RAYMOND ARNETT,

Respondent

SECOND REPLY BRIEF

Lee J. Sclar
William P. Lamb
Robert J. Donovan
CALIFORNIA INDIAN LEGAL SERVICES
2527 Dwight Way
Berkeley, California 94704

Attorneys for Petitioner



SECOND REPLY BRIEF

BASIS FOR BRIEF

This brief is a response to matters first raised by Respondent's Supplemental Reply Brief.

I

THE LEGISLATIVE HISTORY OF 27 STAT. 52 SHOWS NO INTENT TO TERMINATE THE RESERVATION STATUS OF THE LOWER TWENTY MILES OF THE HOOPA EXTENSION

A statute removes land from an Indian reservation only when Congress clearly intends that to happen. (See United States v. Clestine, 215 U.S. 278, 290-291 (1909).) No such clear intent is apparent in the legislative history of the Act of June 17, 1892 (27 Stat. 52).

The "abandoned," "former" reservation referred to in the legislative history of 27 Stat. 52 is the Klamath River Reservation not the Hoopa Valley Extension. The former was established by Executive Order in 1855 and extinguished by the Act of April 8, 1864. The latter was created by the Executive Order of October 16, 1891 and approximately half of it was formed from lands of the abolished Klamath River Reservation. In opening part of the Hoopa Extension to non-Indian settlement, the Act of June 17, 1892 demarcated the opened "surplus" territory as "lands embraced in what was the Klamath River Reservation."

That the Klamath River Reservation, rather than the 1891 Hoopa Extension, is the "former" reservation Congress had in mind is evident even from the report and debates excerpted by Respondent. The committee report excerpts, for instance, state:

"The land referred to in the bill under consideration was set apart as an Indian reservation by an Executive Order dated November 16, 1855....[T]his reservation...became abandoned...since the winter of 1861-62....This bill simply proposes that the land formerly set apart as a reservation, but now abandoned as above stated, shall be disposed of...."

The full legislative history¹ removes any doubt concerning which "former" reservation congress was considering. The House report (No. 161, 52d Cong., 1st Sess.) points out that the Klamath River Reservation ceased to exist because the Act of April 8, 1864, expressly provided for disposal of reservations not included in the four reservations authorized by that act.

Congress did not even mention the Hoopa Valley Extension in its debates or reports on the 1892 Act. It was apparently unaware that a few months earlier the President had issued an Executive Order extending the Hoopa Reservation down the Klamath River from the Hoopa Square to the Ocean.

1. 23 Cong. Rec. 125, 870, 1598-1599, 2301, 3918-3919, 3969, 4158, 4225, 4245, 4417, 4714, 4771, 4893, 5012, 5052, 5738.

The House Committee report says in that regard:

"The Hoopa Valley Reservation is only about 20 miles to the east of the eastern boundary of this tract."

Senator Felton said:

"There is an Indian reservation within 20 miles of the river, where these Indians [of the lower twenty] can go if they want to do so." (23 Cong. Rec. 3918-3919.)

Obviously the House and Senate had no intent, let alone a clear interest (Celestine, supra), to terminate part of a reservation (the Hoopa Extension) which Congress had not even discussed. Congress merely wanted to sell (for the Indians' benefit) parcels of land which Congress felt were surplus to the Indians' needs. Such sales to non-Indian homesteaders are consistent with continued reservation status for the area out of which the parcels were sold. (Seymour v. Superintendent, 368 U.S. 351 (1962).)

Moreover, Congress explicitly contemplated continued Indian use of the lower twenty miles along the Klamath River. The 1892 act which is at issue in this case provided for the Secretary of the Interior to reserve Indian villages and settlements for continued Indian use. Also, H.R. 38 originally provided for removal of Indians from the lower twenty. (23 Cong. Rec. 1599.) The Senate deleted the removal provision (23 Cong. Rec. 3918); and the law as adopted provided that Indians had a preferential

right to allotments of land they occupied on the lower twenty prior to the statute's passage.

The legislative history of 25 Stat. 52 is therefore fully consistent with reservation status for the lower twenty miles of the Hoopa Extension.

II

INTERIOR DEPARTMENT MAPS, BOTH FROM 1892 AND TODAY, SHOW THE LOWER TWENTY MILES OF THE EXTENSION AS PART OF AN INDIAN RESERVATION

Respondent seeks to prop up its arguments with a 1909 Forrest Service map and a 1952 Geological Survey map.

The 1909 map is not contemporaneous with the 1892 act opening the Extension to non-Indian settlement. By contrast, an 1892 map by the Bureau of Indian Affairs--the agency charged with administration of Indian affairs--shows the whole distance from the Pacific to the Hoopa Square as part of an Indian reservation, although it is erroneously labeled as the Klamath River Reservation. (Sixty First Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1892).)

The 1952 Geological Survey map is no longer authoritative. Sheet 272 of the official United States National Atlas shows the lower twenty miles of the Extension as Indian reservation. That Atlas was issued by the Interior Department in 1970 and sheet 272 was prepared by the Geological Survey.

Other current Interior Department maps are consistent with the National Atlas. Appendix A, taken from a Bureau of Indian Affairs map showing Indian Land Areas as of 1971, shows the Hoopa Valley Extension Reservation as separate from the Hoopa Valley Reservation but nevertheless running out to the Pacific Ocean. Appendix B is a Bureau of Land Management map. (RESOURCES AND RECREATION, PUBLIC LANDS, CALIFORNIA, AFOOAMA-67/1910.) The BLM map shows one reservation encompassing the Hoopa Square and all the land for one mile on either side of the Klamath River from the Hoopa Square to the Ocean.

No inferences against the reservation status of the lower twenty miles of the Extension should be drawn from the inconsistent mapmaking in 1908 and 1952. (Cf. City of New Town v. United States, 454 F.2d 121, 125-126 (8th Cir. 1972).)

CONCLUSION

The petition for a writ of certiorari in this case should be granted.

DATED: January 4, 1973

Respectfully submitted

LEE J. SCLAR
WILLIAM P. LAMB
ROBERT J. DONOVAN
CALIFORNIA INDIAN LEGAL SERVICES

By: 

Lee J. Sclar

INDIAN LANDS

And Related Facilities as of 1971

Compiled by the Bureau of Indian Affairs
in cooperation with the
Geological Survey

Legend

- ☐ • Federal Indian Reservation
- ☐ Former Reservations in Oklahoma
- ☐ Existing Tourist Complex
- ☐ Planned Tourist Complex
- ☐ Interstate Highway
- ☐ • National Forest
- ☐ • National Park or Monument
- ☐ • National Wildlife Refuge

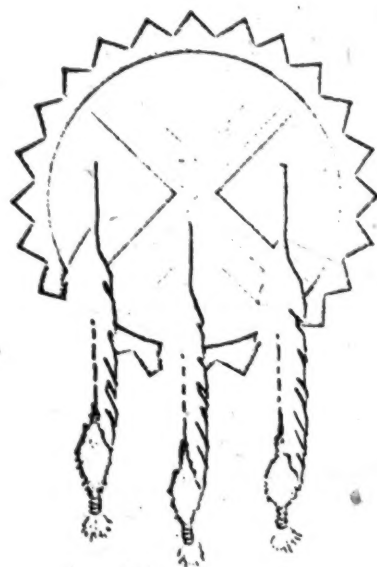
State Reservations
Nos. 1-26

Indian Groups Without Trust Land
Nos. 30-67

Federally Terminated Tribes and Groups
Nos. 80-93

*Iroquois (New York State)—
largely State-Supervised;
Federal consent required for
alienation of land; some Federal
programs available

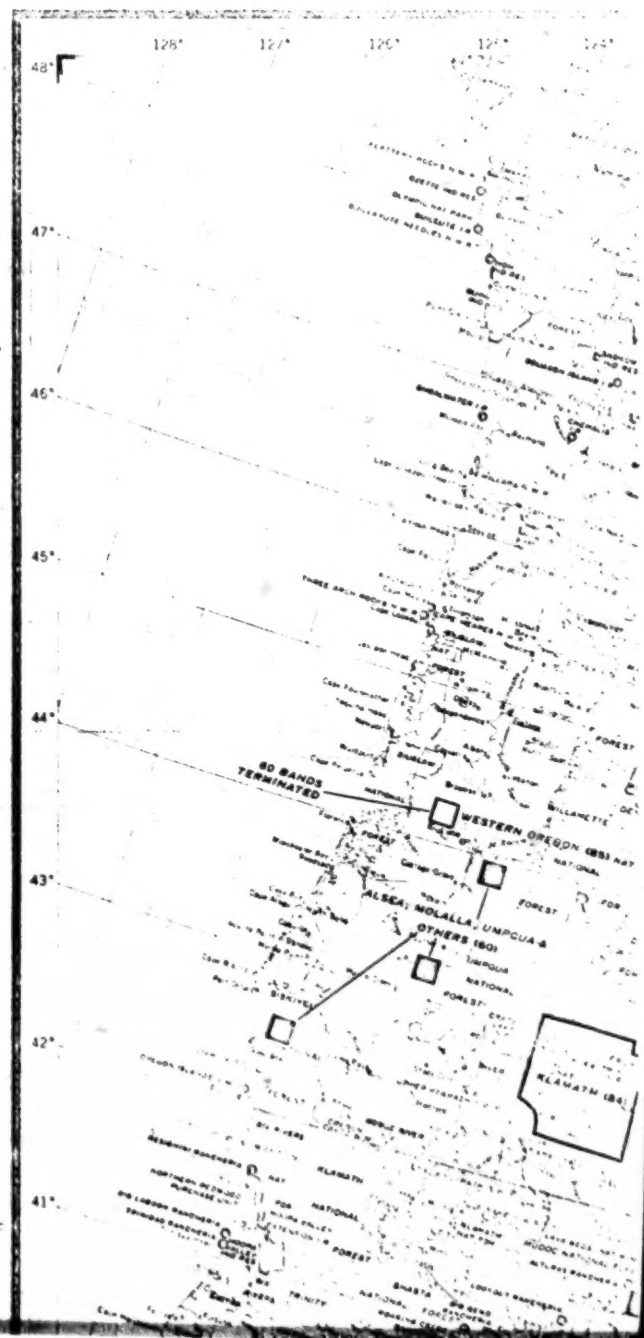
INDIAN LAND AREAS GENERAL

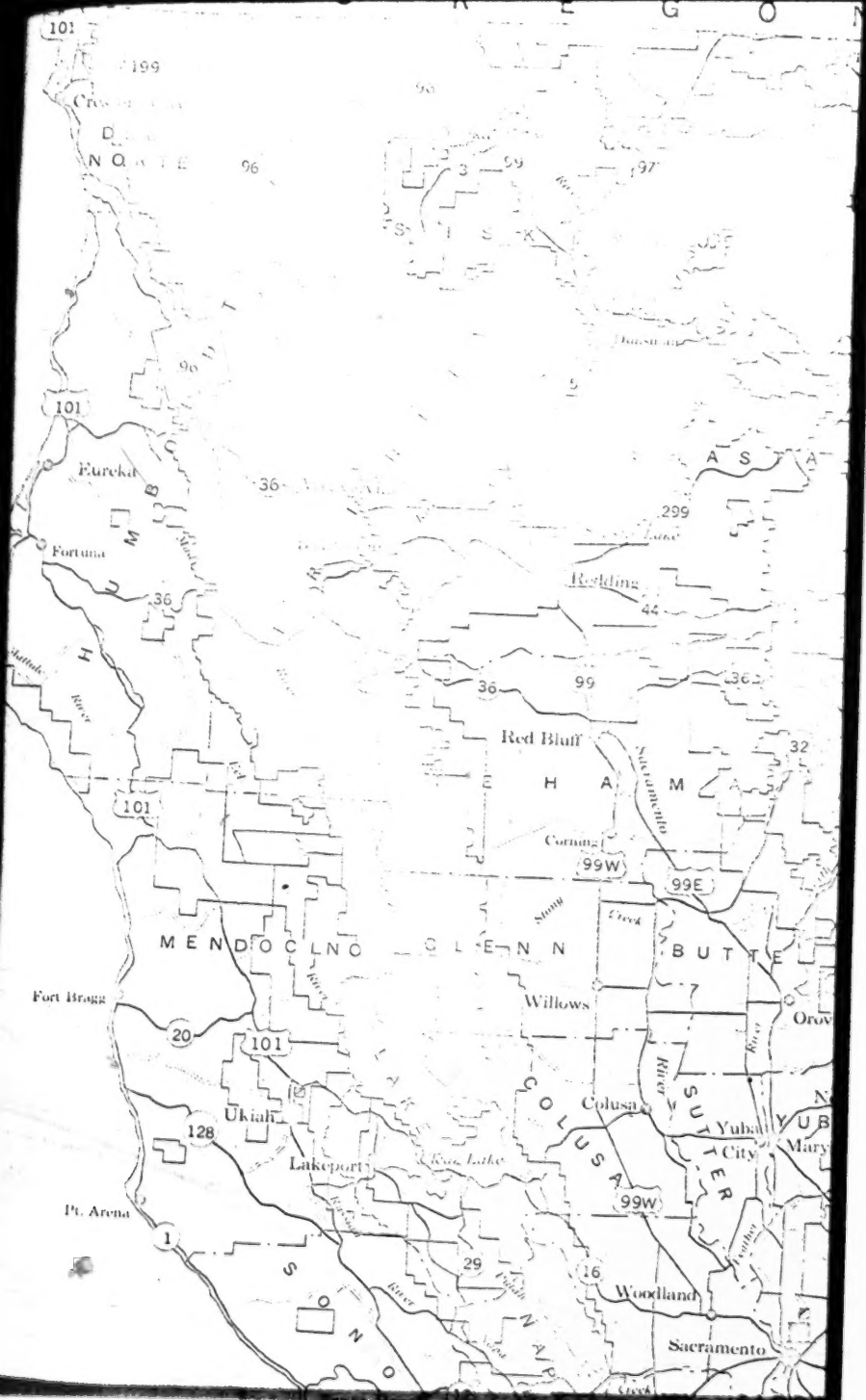


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APPENDIX A





In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1182

RAYMOND MATTZ, PETITIONER

v.

G. RAYMOND ARNETT, AS DIRECTOR OF THE DEPARTMENT
OF FISH AND GAME OF THE STATE OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL, FIRST DISTRICT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 10, 1972, inviting the Solicitor General to express the views of the United States in this case.

1. This action was brought by the respondent for forfeiture of five nylon gill nets owned by the petitioner, Raymond Mattz, on the ground that he used the nets in violation of California's fish and game laws. The nets were seized by a state game warden on land owned by a lumber company within Del Norte County, California, on the Smith River within one mile of its confluence with the Klamath River, and

less than 20 miles from the mouth of the Klamath (Pet. App. A, p. 1).

The petitioner intervened to resist the forfeiture, alleging that he is an enrolled Indian of the Yurok Tribe, that the nets were seized within Indian country as defined by 18 U.S.C. 1151, and that the California law prohibiting use of the nets was therefore inapplicable (*ibid.*).

The trial court held that the land where the nets were seized was not "Indian country" within the scope of 18 U.S.C. 1151 (Pet. App. B, p. 2) and the Court of Appeal of the State of California, First Appellate District, affirmed (Pet. App. A). The Supreme Court of California denied petitioner's application for review (Pet. App. C).¹

The decision below, in our view, is incorrect in holding, in effect, that Congress by permitting homesteading of lands within an Indian reservation thereby terminated the reservation (Pet. App. A, pp. 5-6). This is contrary to this Court's holding in *Seymour v. Superintendent*, 368 U.S. 351, and is also contrary

¹ Having ruled that the land where the nets were seized was not Indian country, the California courts did not reach the issue whether, if the land is Indian country, petitioner is a beneficiary of rights which make the California regulation inapplicable to him. California is one of the States granted criminal and civil jurisdiction within Indian country by Public Law 280, 67 Stat. 588, codified as 18 U.S.C. 1162 *et seq.*, 28 U.S.C. 1360 *et seq.*, and 25 U.S.C. 1321, *et seq.* That statute, however, expressly provides that the grant of jurisdiction shall not "deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to * * * fishing or the control, licensing, or regulation thereof." 18 U.S.C. 1162(b). See also Pet. App. A, pp. 1-2.

to Congress' express definition of Indian country in 18 U.S.C. 1151 (62 Stat. 757, as amended by 63 Stat. 94) as "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent * * *."

2. The rather complex history of the Klamath River (or Hoopa Extension) Reservation is outlined in the petition (pages 3-5) and, except for the meaning of the Act of June 17, 1892, 27 Stat. 52, is not in dispute. This Court affirmed the existence and boundaries of the Reservation in *Donnelly v. United States*, 228 U.S. 243, 253-259. Essentially, the Klamath River Reservation was established by Executive Order of President Pierce dated November 16, 1855. It extended along the Klamath River for a width of one mile on each side for a distance of 20 miles inland from the Pacific Ocean and included the land in question here. By Executive Order dated October 16, 1891, President Harrison extended the Hoopa Valley Reservation to take in the original Klamath River Reservation.²

Between the passage of the General Allotment Act

² We are lodging with the Clerk and have furnished to the parties copies of an illustrative map of the Hoopa Valley Reservation with the 1891 extension and the map of Indian Land Areas dated 1971 published by the U.S. Department of the Interior showing the continued existence of the Reservation. There is pending in the United States Court of Claims a suit, *Jessie Short, et al. v. United States*, No. 10263, in which the issue is whether the joining of the two reservations gave all Indians residing therein rights in the whole or whether each group has rights only within its original portion. Neither the United States nor the other parties to that suit contest the continued existence of the whole as an Indian reservation though the decision of the California court of appeal in this case is, of course, noted.

in 1887³ and the Indian Reorganization Act of 1934,⁴ Congress not only authorized allotments of land within reservations to Indians who lived there but also authorized the Secretary of the Interior to buy surplus lands, *i.e.*, lands not allotted to individual Indians or villages, from the Indians and open them for homesteading by non-Indians. General Allotment Act, Section 5. However, while the General Allotment Act permitted such purchases and disposition of surplus lands, it did not require them. Accordingly, if the Secretary did not acquire unallotted lands within a particular reservation and open them for homesteading, Congress sometimes did so by special legislation.

The statute claimed by respondents to have terminated the Klamath River Reservation was, in our view, a statute opening surplus land in a portion of the Reservation to homesteading, identical in purpose and effect to the Act of March 22, 1906, 34 Stat. 80, which this Court considered in *Seymour v. Superintendent*, *supra*. It had the additional purpose of allowing certain non-Indian settlers to confirm their title to land they had already settled. Senator Pettigrew, in submitting the Conference report to the Senate, explained the factual situation out of which the bill arose (23 Cong. Rec. 4245):

Through some misunderstanding quite a number of settlers went upon this reservation, it being an Executive-order reservation. By conflicting decisions of the Indian Department they went upon it in good faith, and we wish to protect their interests, so that their lands, where they have built houses and made improvements,

³ Act of February 8, 1887, 24 Stat. 388.

⁴ 48 Stat. 984-988, 25 U.S.C. 461-469.

shall not be allotted to Indians who did not occupy them.

The references to the legislative history in respondent's supplemental reply brief (pp. 1-4) in our view give an erroneous impression. The original House report relied on by respondent and the House bill were not accepted by the Senate. The entire first proviso of the Act, in which Indian rights are preserved and the land is referred to as a reservation, was added after the Senate rejected the House bill. Thus, regardless of whether the House bill was intended to abolish the Reservation, the Act as passed indicates no such intention. Compare the House bill (23 Cong. Rec. 1598) with the Act (Pet. App. D, pp. 3-4). Nor apparently was the lack of solicitude expressed by Senator Felton for Indian inhabitants of the Reservation (see Resp. Supp. Reply Br., pp. 3-4) shared by the Senate committee or Conference committee. Compare the remarks of Senator Pettigrew quoted above. See also the comments of Senator Cockrell at 23 Cong. Rec. 3918-3919.⁵

The Act as finally passed (Act of June 17, 1892, 27 Stat. 52) provided that: "all of the lands embraced in what was Klamath River Reservation" reserved under the Executive Order of November 16, 1855, are "declared to be subject to settlement, entry and purchase under the laws of the United States granting homestead rights * * *, *Provided*, That any Indian now located upon said reservation may, at any time

⁵ Additional portions of the legislative history are published in: H. Rep. No. 161, 52d Cong., 1st Sess.; S. Misc. Doc. No. 153, 52d Cong., 1st Sess. (Conference report): 23 Cong. Rec. 1598, 2301, 3918-3919, 3969, 4225, 4417, 4245, 4714, 4893-4894.

within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself * * *. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians." The Act further provided that "the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children" (27 Stat. 53).

In context, the reference to "what was Klamath River Reservation" is only a means of identifying the part of the Klamath-Hoopa Reservation which had previously been the separate Klamath River Reservation and which was the portion on which entry would be allowed. The effect of the Act was to open a part of the Reservation to entry (including entries already made), without displacing Indians living on the Reservation, and to use the funds thus generated for the benefit of resident Indians. There is no indication of a purpose to withdraw federal authority over the Reservation. When reservations were abolished, more direct language was used. Thus in 1868 when Congress abolished the adjoining Smith River Reservation it used the words "The Smith River reservation is hereby discontinued"—15 Stat. 221—and did not rely on implication. See also *Seymour v. Superintendent*, *supra*, 368 U.S. at 355.

Moreover, after allowing entry to surplus lands, Congress itself continued to treat the Klamath River Reservation as an existing reservation. Thus, in the Act of December 24, 1942, 56 Stat. 1081, 25 U.S.C. 348a, "The period of trust on lands allotted to Indians of the Klamath River Reservation * * *" was extended. And in the Act of May 19, 1958, 72 Stat. 121, Congress restored to tribal ownership 159.57 acres of "vacant and undisposed-of ceded lands * * * on the following named Indian reservations: * * * Klamath River, California * * *."

In *United States v. Celestine*, 215 U.S. 278, this Court, in keeping with the general principle that "legislation of Congress is to be construed in the interest of the Indian * * *" (*id.* at 290), specifically stated (*id.* at 285):

[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress.

In sum, it is significant here, as it was in *Seymour v. Superintendent*, *supra*, that "* * * Congress has explicitly recognized the continued existence as a federal Indian reservation of this * * * Reservation." 368 U.S. at 356.

3. Our position in this case is also supported by the congressional definition of Indian country in 18 U.S.C. 1151. See *Seymour v. Superintendent*, *supra*, 368 U.S. at 357-359. This statutory definition, enacted in 1948 and amended in 1949, necessarily had to deal with the effect of statutes such as those opening the Colville and Klamath reservations to non-Indian set-

tlement and thus, in some areas, creating a checkerboard of land held in trust for Indians and land held in fee by Indians and non-Indians. Congress, to avoid such a checkerboard of jurisdictions, defined Indian country as including "all land within the limits of any Indian reservation * * * notwithstanding the issuance of any patent * * *." 18 U.S.C. 1151. If opening a reservation to settlement terminated the reservation, the effect would be to make that provision meaningless for there could be no reservation containing patented lands.

For the foregoing reasons, the petition for a writ of certiorari should be granted.⁶

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

⁶If the Court agrees with our submission that the question presented in the petition is essentially controlled by this Court's decision in *Seymour v. Superintendent, supra*, it may deem the case appropriate for summary reversal with a remand to the California court of appeal for a determination of the question whether the petitioner does in fact have federally secured rights which would exempt him from the application of the California fishing laws in question while in Indian country.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

Supreme Court, U. S.
FILED

FEB 22 1973

MICHAEL RODAK, JR., CLERK

No. 71-1182

RAYMOND MATTZ,
PETITIONER
v.

G. RAYMOND ARNETT, AS DIRECTOR OF
THE DEPARTMENT OF FISH AND GAME
OF THE STATE OF CALIFORNIA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA, FIRST APPELLATE
DISTRICT

BRIEF FOR THE PETITIONER

Lee J. Sclar
Bruce R. Greene
Robert J. Donovan
William P. Lamb
CALIFORNIA INDIAN LEGAL
SERVICES
2527 Dwight Way
Berkeley, California 94704
Attorneys for Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1182

RAYMOND MATTZ,
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DISTRICT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeal
of the State of California is reported at
20 Cal. App.3d 729, 97 Cal. Rptr. 894
and is reproduced in Appendix A to the

Petition For A Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeal was entered on October 21, 1971. The California Supreme Court denied a petition for hearing on December 16, 1971. The petition for a writ of certiorari was due on or before March 15, 1972. (American Railway Express Co. v. Levee, 263 U.S. 19, 21 (1923).) The petition was filed March 14, 1972, and was granted January 15, 1973. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

STATUTES INVOLVED

The Act of June 17, 1892 (27 Stat. 52) and 18 U.S.C. §§1151 and 1162 are set out in Appendix A of this brief.

QUESTION PRESENTED

Did the Act of June 17, 1892 abolish part of the 1891 Extension to the Hoopa Valley Indian Reservation by permitting non-Indians to homestead within that part on parcels which Congress considered beyond the Indians' needs?

STATEMENT OF THE CASE

Yurok Indian life centers on the lower Klamath River near the Pacific

Ocean. (Kroeber, Handbook of the Indians of California 1, 8-9 (1925), A. 41-44.) Fish--taken with dip and gill nets, seines, and harpoons--has always been a staple of the Yurok diet. (Kroeber, supra, at 84-86, A. 34-40.)

The Mattz family is Yurok. (A. 29, 31.) Petitioner's mother, Geneva Mattz, has an Indian trust allotment on the Klamath River at Brooks Riffle. (A. 29.) The Riffle is named after petitioner's grandfather (A. 29), who fished there with dip, gill, and trigger nets. (A. 30.) Yuroks have fished there all Geneva Mattz's life. (A. 30.) Petitioner Raymond Mattz has been fishing with gill nets near Brooks Riffle since he was nine. (A. 32-33.)

On September 4, 1969, a California game warden confiscated five fishing nets belonging to Raymond Mattz. (C.T. 75-76, Appendix B to Petition For A Writ Of Certiorari at 4.) The nets were seized from a stowage approximately 200 feet from the Klamath River, in the vicinity of Brooks Riffle, and within twenty miles of the Pacific Ocean. (C.T. 71, 75-76, Appendix B to Petition For A Writ of Certiorari at 2, 4.)

Claiming that possession of such nets in that area violated state law, respondent Director of the California Department of Fish and Game instituted a forfeiture proceeding in the Del Norte County Superior Court. (A. 3-6.) Raymond Mattz intervened and asked for return of his nets. (A. 6-9.) He alleged that he is an enrolled Indian, that the nets were in "Indian Country," and that the state's fishing laws were therefore inapplicable. (A. 7-8.)

The superior court ruled that the nets were seized on the 1891 Extension to the Hoopa Valley Indian Reservation but that the Act of June 17, 1892, had terminated the twenty miles of the Extension closest to the Pacific by opening that region for public purchase. (C.T. 71, 75-76, Appendix B to Petition For A Writ of Certiorari at 1-2, 4-5.) The court also determined that the seizure occurred on land of the Simpson Timber Company (C.T. 75-76) and not on Geneva Mattz's adjacent allotment (A. 29). Accordingly, the court found that the nets were seized outside Indian country and subject to forfeiture

under California's fishing laws. (C.T. 76-77, Appendix B to Petition For A Writ of Certiorari at 5.)¹

The Court of Appeal affirmed (Appendix A to Petition For A Writ of Certiorari); and the California Supreme Court denied petitioner a hearing (Appendix C to Petition For A Writ of Certiorari).

SUMMARY OF ARGUMENT

The Act of June 17, 1892, did not terminate the reservation status of the oceanward (or lower) twenty miles of the 1891 Extension to the Hoopa Valley Indian Reservation. Continued reservation status is not inconsistent with a provision in the 1892 Act permitting non-

1. The superior court did not decide whether the seizure would have been lawful if made in Indian country.

The Court of Appeal indicated in dicta that 18 U.S.C. §1162 authorizes California to apply state fishing laws on a reservation unless a federal treaty, agreement or statute establishes special Indian fishing rights. That is an incorrect statement of the law. State laws also do not apply where fishing rights are afforded under federal regulations. (Metlakatla Indian Community v. Egan, 369 U.S. 45, 56-57 (1962); Donahue v. California Justice Court, 15 Cal. App. 3d 557 (1971), cert. denied 404 U.S. 990 (1971).)

Indians to homestead parcels which Congress considered beyond the Indians' needs. The contrary ruling of the Court of Appeal is inconsistent with 18 U.S.C. §1151 which defines Indian country as including patented land within a reservation.

A statute terminates a reservation only when Congress' intent to do so is clear. That intent is not present in the Act of June 17, 1892. The oceanward twenty miles of the Extension were not restored to the public domain. Instead the Government sold the "surplus" land as the Indians' trustee and was required to credit the money to the Indians' account. Congress deleted from the Act a provision that would have called for removal of the Indians from the disputed area.

BIA maps drawn soon after the Act's passage and present BIA maps both show the lower twenty miles of the Extension as part of a reservation. In addition, prior rulings in a court of Claims case and by the Interior Department support petitioner's view that the Act of June 17, 1892 did not terminate any part of the 1891 Hoopa Extension.

ARGUMENT

I

THE ACT OF JUNE 17, 1892, REVEALS NO CONGRESSIONAL INTENT TO TERMINATE THE RESERVATION STATUS OF THE OCEANWARD TWENTY MILES OF THE HOOPA EXTENSION

Laws affecting Indians are to be construed in the way most favorable to the Indians. (Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Choate v. Trapp, 224 U.S. 665, 675 (1912).) A statute removes land from a reservation only when Congress clearly intends that to happen. (See United States v. Celestine, 215 U.S. 278, 290-291 (1909).) The Act of June 17, 1892 (27 Stat. 52) evinces no such clear intent for the oceanward twenty miles of the 1891 Extension to the Hoopa Valley Indian Reservation.

A. The Act of June 17, 1892, Closely Resembles The 1906 Act Which Seymour v. Superintendent Held Did Not Abolish The South Half of the Colville Reservation.

In 1876 President Grant issued an Executive Order creating the Hoopa Valley Indian Reservation. (I Kappler, Indian Affairs--Laws and Treaties 815, A. 18-19.) It was roughly a twelve mile

square around the Trinity River just above its juncture with the Klamath River.

On October 16, 1891 President Harrison extended the boundaries of the Hoopa Valley Reservation to include a strip one mile on each side of the Klamath River from the then boundary of the reservation to the Pacific Ocean. (I Kappler, Indian Affairs--Laws and Treaties 815, A. 19.) That strip, about 40 miles long, is sometimes referred to as the Hoopa Extension.

The Act of June 17, 1892, provided that Indians living on the oceanward (or lower) twenty miles of the Extension² were to have one year to select allotments--pieces of land held in trust for individual Indians by the United States--from that portion of the Extension. After that the Secretary of the Interior was to reserve land being used for Indian villages. Any remaining land on the lower twenty was to be disposed of under the homestead acts and laws authorizing sale of mineral, stone, and timber lands. This "remaining"

2. This area was described in the 1892 law as "the lands embraced in what was [the] Klamath River Reservation." For an explanation of that description see part B of this section of the Argument.

land was not to be restored to the public domain, however. The proceeds of the land sales, rather than accruing to the Government, were to be held in trust for the maintenance and education of Indians residing on the lower twenty miles of the Extension.³

This is substantially the same legislative pattern to be found in the Act of March 22, 1906 (34 Stat. 80), which Seymour v. Superintendent, 368 U.S. 351 (1962), held did not terminate the South half of the Colville Reservation. There too allotments were made to individual Indians on the reservation, some land was reserved for communal purposes, unallotted and unreserved land was opened for homesteading and other types of non-Indian appropriation, and land sale proceeds were to be held in trust for the Indians.

This Court in Seymour contrasted the 1906 Colville statute with another statute pertaining to Colville, the Act of July 1, 1892 (27 Stat. 62). The 1892 law was held to have terminated the North half of the Colville Reservation by expressly restoring

3. The uses of the trust fund were changed in an insignificant way by the Act of March 2, 1917 (39 Stat. 976).

it to the public domain and giving Congress the power to appropriate the proceeds for general public use.

Like the 1906 Colville Act and unlike the 1892 Colville Act, the 1892 Hoopa Extension Act contains no provision placing any lands in the public domain. Nor does the 1892 Hoopa Extension Act contain any language vacating the lower twenty miles of the Extension. (Compare the 1892 Colville Act.)

Like the 1906 Colville Act and unlike the 1892 Colville Act, the 1892 Hoopa Extension Act makes the United States trustee for reservation land sale proceeds rather than broker for sales of its own lands.

The non-Indian homesteading allowed by the 1892 Hoopa Extension Act is not inconsistent with reservation status for the Extension's lower twenty miles. The contrary conclusion of the Court of Appeal is simply not tenable in light of 18 U.S.C. §1151 which defines Indian country for purposes of 18 U.S.C. §1162 as including "all land within the limits of any Indian reservation...notwithstanding the issuance of any patent." Seymour v. Superintendent, supra, so held as does New Town v. United

States, 454 F.2d 121 (8th Cir. 1972).⁴

When Congress wishes to disestablish an Indian reservation, it knows how to do so and does it expressly and not by subtle implication. (See Section 3 of the Act of April 8, 1864 (13 Stat. 39): "shall not be retained for the purposes of Indian reservations;" Act of July 27, 1868 (15 Stat. 221) "reservation is hereby discontinued.") The 1892 Colville Act did so. The 1892 Hoopa Extension Act, passed two weeks earlier, did not.⁵

4. The non-Indian ownership of the land where the nets were seized does not matter either. Non-Indian owned lands within a reservation are nevertheless part of that reservation. (18 U.S.C. §1151; Seymour, *supra*, 352 U.S. at 357-358; Hildebrand v. Taylor, 327 F.2d 205 (10th Cir. 1964); New Town v. United States, *supra*.)

5. Elser v. Gill Net Number One, 246 Cal.App.2d 30 (1966) states at 34:

"Thus [after the 1892 Act], the lower 20 miles of the 40 mile long strip of land included in the 1891 extension of the Hoopa Valley Reservation, for all practical purposes almost immediately lost its identity as part of the Hoopa Valley Reservation." (*Id.* at 34.)

What the court meant by "for all practical purposes" is not clear. That lack of clarity is not surprising, however, for the case [footnote continued on next page]

B. The Phrase "Lands Embraced In What Was [The] Klamath River Reservation" In The Act Of June 17, 1892, Was Used Only For Purposes Of Demarcation And Not To Indicate A Change In The Land's Status

In 1892, when Congress opened up the lower twenty miles of the Hoopa Extension to non-Indian settlement, it described the affected land as "lands embraced in what was [the] Klamath River Reservation." That description was accurate because the Klamath River Reservation, which was created in 1855, had ceased to exist by 1876.

President Pierce established the Klamath River Reservation by Executive Order on November 15, 1855. (I Kappler, Indian Affairs--Laws and Treaties 816-817, A. 20-25.) It was a strip of land one mile wide on each side of the Klamath River from the Pacific Ocean up involved events on the upper 20 miles of the Extension. Even if the statement were not dicta, however, it would show no more than that Indians have been ignorant of and too poor to enforce their legal rights. The status of land under 18 U.S.C. §§1151 and 1162 cannot be concluded even by a fifty year old state court decision. (Seymour v. Superintendent, supra, 268 U.S. 351 at 353.)

river until it included 25,000 acres. This distance turned out to be approximately twenty miles.

In 1864 a law was enacted which directed the President to establish four reservations for California Indians. (Act of April 8, 1864 (13 Stat. 39).) Section 2 of that law authorized the President to include existing reservations in the four reservations. Section 3 provided for the disposition of the "several Indian reservations in California which shall not be retained for the purposes of Indian reservations, under the provisions of the preceding section of this act." That is, the 1864 law expressly provided that existing reservations would cease to have the status of Indian reservations if not included in the four new reservations. (United States v. Forty-Eight Pounds of Rising Star Tea, 38 Fed. 400 (C.C.N.D. Cal. 1889).)

Between 1864 and 1876 the President created four reservations.⁶ One of these

6. The dates when these four reservations came into existence is somewhat muddled because the President himself did not purport to create a reservation until long after the reservation had been recognized by other government officials. (See I Kappler, [footnote continued on next page])

was the Hoopa Valley Indian Reservation; but neither the Hoopa Valley Reservation nor any of the other three included the oceanward twenty miles along the Klamath River. The Klamath River Reservation therefore ceased to exist in 1876, at the latest; the 1892 Act simply cannot be construed to have terminated the Klamath River Reservation which had ceased to exist 16 years earlier.

However, in 1892 Congress could properly use the phrase "land embraced in what was [the] Klamath River Reservation" to describe the area which had long before been the Klamath River Reservation and which the President had added to the Hoopa Valley Reservation in 1891 as the Lower twenty miles of the Hoopa Extension. While the reasons for Congress' use of that dated description cannot be stated with absolute precision, at least three explanations are plausible.

First, the use of the phrase was

Indian Affairs--Laws and Treaties 815;
Donnelly v. United States, 228 U.S. 243
(1913); United States v. Forty Eight
Pounds of Rising Star Tea, 35 Fed 403,
405 (N.D. Cal. 1888), aff'd, 38 Fed.
400 (C.C.N.D. Cal. 1889).)

a convenient short-hand method of demarcating that land which was to be opened to non-Indian settlement. Only this area from among the forty miles of the Extension and the 12 mile square Hoopa Valley was to be available to non-Indians.

A second explanation was suggested by a Court of Claims commissioner in Jessie Short v. United States (No. 102-63). In a ruling of May 22, 1972, the commissioner wrote:

Bills of this nature [i.e., like the Act of June 17, 1892] had been considered for many years on the premise that the Klamath River Reservation was abandoned (see findings 50-77, supra); the proponents were not about to make their cause less attractive by amending the name of the reservation to call it the former Klamath River Reservation, now part of the Hoopa Valley Reservation.

A third possibility is that sheer inadvertence caused Congress to describe the demarcated land by reference to the defunct Klamath River Reservation.

The 1892 Act was introduced in Congress on January 5 of that year. (23 Cong. Rec. 125.) The President issued the Executive Order creating the Hoopa Extension less than three months earlier. Congress may not have known of the President's action at the time of the bill's introduction. (See Section II, infra.)

In any case, describing part of the Extension with the phrase "lands embraced in what was [the] Klamath River Reservation" shows no clear Congressional intent to do away with any part of the Hoopa Valley Reservation or its Extension.

II

THE LEGISLATIVE HISTORY OF THE ACT OF JUNE 17, 1892, SHOWS NO INTENT TO TERMINATE THE RESERVATION STATUS OF THE LOWER TWENTY MILES OF THE HOOPA EXTENSION.

The legislative history of the Act of June 17, 1892⁷ reveals that the law was enacted because many non-Indians had settled on lands of the Klamath River Reservation after it ceased to be a reser-

7. H.Rpt.No. 161, 52d Cong., 1st Sess.; S.Misc.Doc.No. 153 52d Cong., 1st Sess.; 23 Cong.Rec. 125, 870, 1598-1599, 2301, 3918, 3919, 3969, 4158, 4225, 4245, 4417, 4714, 4771, 4893, 5012, 5052, 5738.

vation. (Remarks of Representative Geary, 23 Cong. Rec. 1599 (Mar. 1, 1892); Remarks of Senator Felton, 23 Cong. Rec. 3919 (May 4, 1892).) Congress felt that these non-Indians had settled in good faith and should have their interests protected. (Remarks of Senator Pettigrew, 23 Cong. Rec. 4245 (May 13, 1892).)

An end to Indian use of the land was expressly rejected, however. The House version of the law (H.R. 38, 52d Cong., 1st Sess.) originally provided for removal of Indians from the lower twenty miles of the Extension. (23 Cong. Rec. 1599.) The Senate deleted the removal provision (23 Cong. Rec. 3918); and the law as adopted provided that Indians had a preferential right to allotments they occupied on the lower twenty prior to the statute's passage. Also, the law provided for the Secretary of the Interior to reserve Indian villages and settlements for continued Indian use.

The House debates and committee report do state that the bill was concerned with land in a "former" "abandoned" reservation, but that former reservation is clearly the long previously extinguished

Klamath River Reservation, not the Hoopa Extension. (H.Rpt.No. 161, 52d Cong., 1st Sess.)

In neither house was the 1891 Extension mentioned in the debates or the reports. Congress was seemingly unaware that a few months earlier the President had issued an Executive Order extending the Hoopa Valley Reservation down the Klamath River from the Hoopa Square to the Ocean.

The House Committee report says in that regard:

"The Hoopa Valley Reservation is only about 20 miles to the east of the eastern boundary of this tract."

Senator Felton said:

"There is an Indian reservation within 20 miles of the river, where these Indians [of the lower twenty] can go if they want to do so." (23 Cong. Rec. 3918-3919.)

Obviously, Congress could have had no intent, let alone the clear intent required by United States v. Celestine, supra, 215 U.S. 278, 290-291, to termin-

ate part of a reservation (the Hoopa Extension) which the House and Senate had not even discussed. (Cf. Menominee Tribe of Indians v. United States, 101 Ct.Cl. 10, 21 (1944).)

Congress merely wanted to sell (for the Indians' benefit) parcels of land which Congress felt were surplus to the Indians needs and which had been settled in good faith by non-Indians. Such a provision for sales to non-Indian homesteaders is fully consistent with reservation status for the area of the Extension out of which the parcels were sold. (Seymour v. Superintendent, supra, 368 U.S. 351.)

III

SUBSEQUENT LEGISLATION SUPPORTS RESERVATION STATUS FOR THE LOWER TWENTY MILES OF THE HOOPA EXTENSION

In Seymour v. Superintendent, supra, 368 U.S. 351 at 356-357, this Court looked at later laws to confirm its views about the 1906 Colville Act.⁸ A similar examination of subsequent statutes concerning the lower

8. Generally, subsequent legislation is not entitled to great weight in interpreting prior enactments. (United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968).)

twenty miles of the Hoopa Extension supports continued reservation status for that area.

The Act of May 19, 1958 (72 Stat. 121) provided:

"[v]acant and undisposed-of ceded lands...on the following named Indian reservations are hereby restored to tribal ownership... :...Klamath River, California

* * *

[S]uch lands are hereby added to and made a part of the existing reservations for such tribe or tribes."

The only way lands could be restored to tribal ownership "on" the "existing" Klamath River Reservation is if the lower twenty miles of the Hoopa Extension were part of a reservation in 1958. (See Seymour, supra, 368 U.S. 351 at 356-357 construing an indistinguishable Colville Reservation statute.) The denomination of that area as Klamath River rather than Hoopa Valley or Hoopa Extension in no way changes the statute's recognition of the lower twenty as part of an "existing reservation" and Indian country within the meaning of 18 U.S.C. §§1151 and 1162.

25 U.S.C. §348a (the Act of December 24, 1942, 56 Stat. 1081) also recognizes the reservation status of the lower twenty miles of the Extension. It provides in relevant part:

"The period of trust on lands allotted to Indians of the Klamath River Reservation, California, which expired July 31, 1919,...is hereby reimposed."

The statute was enacted to broaden an Executive Order of September 23, 1919. That order extended the trust period for "allotments to Klamath River Indians on the Hoopa Valley Reservation." Twenty six allottees in the same area were not benefited by the order, however. The trust status of their allotments had already lapsed.

When this was discovered, the Secretary of the Interior wrote to Congress and explained the need to reimpose trust status on these twenty six allotments. (S.Rpt.No. 1714, 77th Cong., 2d Sess.) The Secretary quoted the Executive Order, which placed the allotments "on the Hoopa Valley Reservation." He also referred to the allotments as being on the Klamath River Reservation or the Klamath River Indian Reser-

vation, both of which phrases he equated with the description in the order, i.e., land allotted to Klamath River Indians "on the Hoopa Valley Reservation." He used all three terms interchangeably.

Congress then utilized the term Klamath River Reservation in the law as a short hand way of describing that portion of the Hoopa Valley Reservation occupied by the Klamath River Indians and now known as the lower twenty miles of the Hoopa Extension.

IV

TWO FEDERAL RULINGS SUPPORT RESERVATION STATUS FOR THE LOWER TWENTY MILES OF THE HOOPA EXTENSION

Jessie Short v. United States, supra, is a Court of Claims proceeding (No. 102-63) to determine whether Indians of the Hoopa Extension are entitled to share in proceeds from timber sales on the Hoopa Square. The main issue in that case is whether the Extension and the Square are one reservation.

On May 22, 1972, a Court of Claim's commissioner ruled that the Extension and the Square are one reservation.⁹ The

9. The Court need not decide in this case if the Extension is part of the Hoopa Valley [footnote continued on next page]

commissioner then ruled that the lower twenty miles of the Extension are part of that reservation. (Slip Opinion at 111.) People born on the lower twenty after 1892 were held to have been born on the reservation. (Slip Opinion at 115 (§ 209), 116 (§§ 213, 214).)

The commissioner's ruling is in accord with petitioner's view of the act of June 17, 1892, and totally inconsistent with the State's view.

Also supporting reservation status for the entire Extension is an Interior Department Decision. In Rights Of Indians In The Hoopa Valley Indian Reservation, California, 65 I.D. 59, the Interior Department's Deputy Solicitor wrote:

"The former Klamath River Reservation and the connecting strip [i.e., the upper twenty miles of the Extension] are, technically, a part of the enlarged Hoopa Valley Reservation. (Id. at 64.)

A comparable Interior Department opinion Reservation. The Extension will be equally subject or not subject to state fishing laws under 18 U.S.C. §§1151 and 1162 whether it is a separate reservation or part of another.

was used in Seymour to support continued reservation status for the South Half of the Colville Reservation. (368 U.S. 351 at 357.)

V

BUREAU OF INDIAN AFFAIRS MAPS,
BOTH FROM 1892 AND TODAY, SHOW
THE LOWER TWENTY MILES OF THE
EXTENSION AS PART OF A RESERVATION

The Bureau of Indian Affairs is the agency charged with the administration of Indian lands. Its view of this matter is relevant. (Seymour v. Superintendent, supra, 368 U.S. 351 at 357.)

An 1892 map prepared by the BIA shows the whole strip from the Pacific to the Hoopa Square as part of an Indian reservation, although the strip is there labeled as the Klamath River Reservation. (Sixty First Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1892).)

In 1932 the Superintendent of the BIA's Hoopa Agency testified before Congress that the Hoopa Square and the Extension from the square to the coast is all connected and all classed as one reservation, although the Square is called Hoopa

and the Extension is referred to as the Klamath. (Survey of Conditions of Indians in The United States, Hearings before a Subcommittee of the Senate Committee on Indian Affairs, Part 29 at 15531-15532 (1932), A.13-14.)

A Bureau of Indian Affairs map of Indian Land Areas as of 1971 shows the Hoopa Valley Extension Reservation as distinct from the Hoopa Valley Reservation but nevertheless running out to the Pacific. Copies of that map have been supplied to the Court by the Solicitor General, and a copy of the relevant portion of the map is Appendix A to Petitioner's Second Reply Brief in support of the petition for certiorari.

Other maps also show the entire 1891 Extension as a reservation. One such map is sheet 272 of the official National Atlas published by the Interior Department in 1970. Another is a Bureau of Land Management map (RESOURCES AND RECREATION, PUBLIC LANDS, CALIFORNIA, AFOOAMA-67/1910). A copy of the relevant part of that map is Appendix B to Petitioner's Second Reply Brief in support of the petition for certiorari.

* Some maps from the Agriculture Department and even the Interior Department are in conflict with the above maps. (See Respondent's Supplemental Reply Brief.) This is not surprising in view of the complex legal history of the area; and no inferences against reservation status for the lower twenty miles of the Extension should be drawn from the inconsistent maps. (Cf. Seymour v. Superintendent, supra, 368 U.S. 351 at 356, fn. 12; New Town v. United States, supra, 454 F.2d 121 at 125-126.

The significant maps are those issued by the Bureau of Indian Affairs today and contemporaneously with the Act of June 17, 1892. Both such maps support reservation status for the area which once was included in the Klamath River Reservation and in 1891 was included in the Extension to the Hoopa Valley Reservation.

CONCLUSION

The Yuroks, like other Indians in California and elsewhere in the United States, live in conditions of poverty. Net fishing along the Klamath River affords them a way to supplement their diet and retain at least one aspect of their traditional life.

The Hoopa Extension is all that is left of the Yurok's land along the Klamath. It and the other reservation land in California constitutes only a minute part of the state. California's effort to further reduce the area where Indians may control their own fishing is totally unconscionable and not sactioned by the Act of June 17, 1892.

This Court should reverse the judgment below and remand for further proceedings consistent with the reservation status of the land where Raymond Mattz's nets were seized.

Dated: February 15, 1973

Respectfully submitted,

LEE J. SCLAR
BRUCE R. GREENE
ROBERT J. DONOVAN
WILLIAM P. LAMB
CALIFORNIA INDIAN
LEGAL SERVICES

By: _____

Lee J. Sclar

APPENDIX A

Act of June 17, 1892, 27 Stat. 52

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive Order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: Provided, That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the

Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof:

Provided, That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said

period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first in order of time: Provided, That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: And provided further, That the heirs of any deceased settler shall succeed to the rights of such settler under this act: Provided further, That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children..

18 U.S.C. § 1151 (62 Stat. 757,
as amended by 63 Stat. 94)

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian county", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1162 (67 Stat. 588,
as amended by 84 Stat. 1358)

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction

over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or
Territory of

Indian County
Affected

Alaska.....	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
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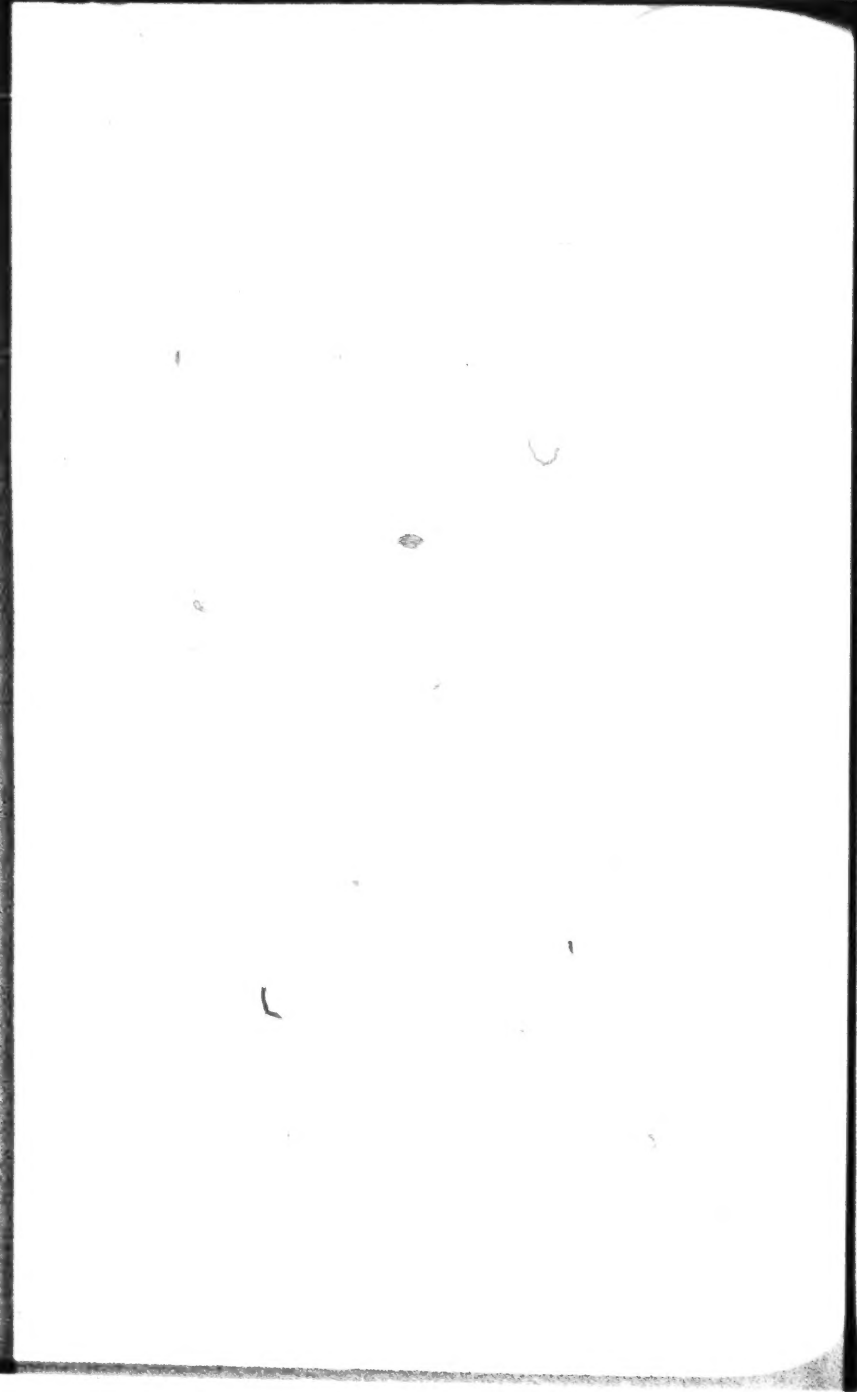
California.....	All Indian country within the State
Minnesota.....	All Indian country within the State, except the Red Lake Reservation
Nebraska.....	All Indian country within the State
Oregon.....	All Indian country within the State, except the Warm Springs Reservation
Wisconsin.....	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or com-

munity of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.





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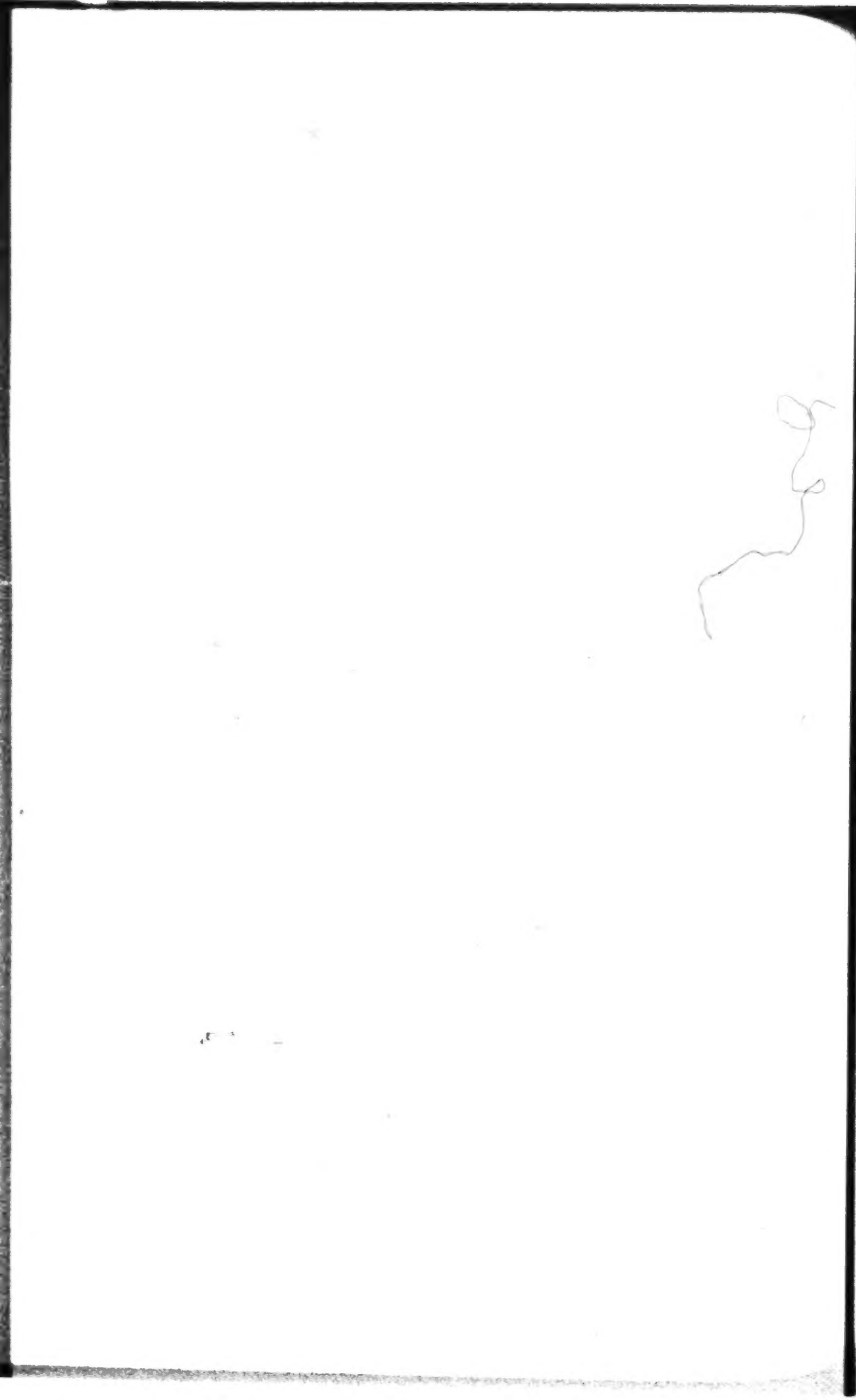
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1182

G. RAYMOND ARNETT, as Director of the Department
of Fish and Game of the State of California,
Plaintiff and Respondent,

vs.

5 GILL NETS, etc.,

Defendant,

RAYMOND MATTZ,

Intervenor and Petitioner.

On Writ of Certiorari to the Court of Appeal of the
State of California, First Appellate District

Brief for the Respondent

STATEMENT OF THE CASE

The respondent adopts the Statement of the Case submitted by the petitioner.

SUMMARY OF ARGUMENT

The Act of June 17, 1892 (hereinafter the "1892 act") was intended to terminate the reservation status of the lower twenty miles of the Klamath River, which had formerly been known as the "Klamath River Reservation" or

the "extension" of the Hoopa Valley Indian Reservation. See 27 Stat. 52. This conclusion is apparent from the face of the 1892 act itself, since the main provisions of the act opened up the lands of the former reservation for settlement under the homestead laws. This conclusion is also apparent from the legislative history behind the act, since this history shows that Congress did not regard the area as a *de facto* reservation prior to the act's passage, and since the congressional purpose behind the act was inconsistent with a continuation of the reservation status of the area.

The matter before the U. S. Supreme Court in *Seymour v. Superintendent*, 368 U.S. 351 (1962), is distinguishable from the pending case. The clear revelations of legislative history concerning the 1892 act were not present in the 1906 act considered by the *Seymour* Court. Also, the act before the *Seymour* Court contained many references indicating that the reservation status of the southern half of the Colville Indian Reservation was to continue in effect (See 34 Stat. 80); no such references were contained in the 1892 act presently before this Court. Also, the *Seymour* Court noted that another act passed in 1892 effectively terminated the reservation status of the northern half of the Colville reservation (see 27 Stat. 62), and the latter act is similar to the 1892 act concerning the former Klamath River Reservation.

That the 1892 act was intended to discontinue the former Klamath River Reservation is also apparent from a 1909 map contained in a presidential proclamation issued that year. An 1892 map prepared by the U. S. Department of the Interior, cited by the petitioner, was prepared prior to the 1892 act, and hence is of no significance in interpreting the act. Nor are two recent federal "rulings" cited by the peti-

tioner of any significance, because the essential question before this Court was not considered in either "ruling." See *Short v. United States*, pending No. 102-63 (Ct. Cl.); 65 I.D. 59, 64 (1958).

Finally, 18 U.S.C. § 1151 does not infer, as argued by the United States in its amicus brief, that the reservation status of an area is not to be terminated even though Indian villages and trust allotments in the area continue under federal jurisdiction.

ARGUMENT

1. The Language of the 1892 Act Shows That the Reservation Status of the Former Klamath River Reservation Was Terminated Thereby.

The 1892 act provided that the lands of the former Klamath River Reservation were to be opened for settlement, entry and purchase under the homestead laws, and the laws authorizing the sale of mineral, stone and timber lands. Indians located on these lands were to be allowed to secure allotments held in trust by the United States, and to convert the allotments to fee patents after the trusteeship period had expired.

A careful reading of the 1892 act strongly suggests that Congress intended to discontinue the reservation status of these lands. The fact that the lands were to be opened up for settlement and sale by homesteaders strongly militates against a continuation of such reservation status. The lands of an Indian reservation are normally reserved from sale. As the Supreme Court declared in *United States v. Celestine*, 215 U.S. 278, 285 (1909), in defining an Indian "reservation",

"The word is used in the land law to describe any body of land, large or small, which Congress has reserved

from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, ..."

For instance, the 1876 proclamation creating the Hoopa Valley Indian Reservation provided that the lands thereon are "withdrawn from public sale, and set apart for Indian purposes." 13 Stat 39. The 1892 act, by opening up the lands of the former Klamath River Reservation for settlement and sale, created an effect opposite to that of the proclamation on the lower 20 miles of the Klamath River. Although the sale and settlement of these lands does not conclusively establish that the area is no longer a reservation (see *Seymour v. Superintendent*, 368 U.S. 351 (1962)), the *Celestine* language suggests that such factors strongly lead toward that conclusion. See *De Marrias v. State of South Dakota*, 206 F.Supp. 549 (D.S.D. 1962), *aff'd* 319 F.2d 845 (8th Cir. 1963).

Other provisions in the 1892 act promote a similar conclusion. The act enables the Secretary of the Interior to "reserve" lands in the old Klamath River Reservation from sale and settlement. This provision appears to authorize the creation of a smaller reservation or reservations on the lands of the old reservation. This infers that only the specific area or areas so designated by the Secretary are to acquire reservation status, and that the reservation is not to extend beyond these areas.

The 1892 act also provides that allotments to the Indians are to be made under the General Allotment Act of 1887 (25 U.S.C. § 331 *et seq.*). This Court has previously held that this latter act reflected a congressional "policy of assimilating the Indians through dissolution of tribal governments and

the compulsory individualization of Indian land," and that the allotment was intended to "lessen the difficulty of the period of transition." See *Board of County Comm'rs v. Seber*, 318 U.S. 705, 716 (1943); see also *Poafpybitty et al. v. Skelly Oil Co. et al.*, 390 U.S. 365, 369 (1968); *Hopkins v. United States*, 414 F. 2d 464, 467 (9th Cir. 1969).¹ The allotment provision in the 1892 act was thus intended to steer the Indians away from their dependence on the reservation. Although such a provision does not conclusively indicate that the reservation itself is to be terminated (see *United States v. Celestine*, *supra* at 287), the provision, in the context of other provisions opening up the lands for settlement and sale, suggests an overall congressional policy to terminate the reservation status of the area.

II. The Legislative History Surrounding the 1892 Act Reveals That Congress Intended to Discontinue the Former Klamath River Reservation.

A. Analysis of Legislative History.

The legislative history surrounding the 1892 act even more clearly reveals the congressional purpose to discontinue the reservation status of the old Klamath River Reservation. The act was based on a bill introduced into the House of Representatives, H.R. 38. The bill was accompanied by a House report, Report No. 161. This report stated in part,

1. It should be noted that this assimilation policy was largely changed by the Indian Reorganization Act of 1934 (48 Stat. 984, 18 U.S.C. § 461 *et seq.*), although the original policy was partially restored in 1953. See H.R. Con. Res. 108, 83d Cong., 1st Sess., 99 Cong. Rec. 10815 (1953); 42 U.S.C. L. Rev. 101, 108 (1968). But such subsequent legislative history cannot, of course, affect the congressional intent respecting the enactment of 1892. Cf. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

"The land referred to in the bill under consideration was set apart as an Indian reservation by an Executive order dated November 16, 1855. *It has not, in fact, been used by the Government as a reservation since the winter of 1861-62.*

"[T]his reservation, under the provisions of the act of Congress just referred to, became abandoned in law, as it has been in fact, since the winter of 1861-62....

"As this land does not constitute an Indian reservation, and has not been used as such for about twenty-eight years, there does not appear to be any reasonable objection to the passage of the present bill. . . .

"[T]his bill simply proposes that the land formerly set apart as a reservation, but now abandoned as above stated, shall be disposed of, as are other lands of the same class or quality, under the general laws of the United States, giving to those who have settled upon them in good faith the prior right to enter that portion upon which settlement has been made.

"The few Indians now on this tract, variously estimated to be from fifty to one hundred in number, occupy small villages at or near the mouth of Klamath River. . . .

"These Indians have not, *since the abandonment of this reservation*, been in any manner cared for, aided or instructed in the ways of civilization by the Government. This duty the Government may hereafter desire to perform, and to this end, and as a matter of justice to these Indians and their children, we think the proceeds to be derived from the sale of these lands should constitute a fund to be used for their removal, maintenance, and education, when in the judgment of the Secretary of the Interior their interests require an expenditure for such purpose." H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892). (Emphasis added.)

The bill was originally considered in the House. The bill's spokesman, Representative Geary, stated during the House debates, in urging the bill's passage,

"The land embraced in this bill was originally an Indian reservation. *In 1861 it was abandoned, and never since has been used for that purpose. Since 1868 it has been occupied by settlers*, and this merely authorizes the Land Department to enable them to acquire title to the land which they occupy. . . .

"All the land in this reservation has been taken up by settlers. . . . The land is all occupied, and the settlers have filed their claims, but the Land Department cannot take action on them until Congress passes this act." 23 Cong. Rec. 1598-99 (1892). (Emphasis added.)

After passage in the House, the bill was sent to the Senate. The spokesman for the bill in the Senate, Senator Felton, declared during the senate debate,

"The Klamath Indian Reservation was set apart by a proclamation of the president some twenty years ago, I think. . . . *It never has been used as an Indian reservation. . . .*

"There is an Indian reservation within 20 miles of the river, where these Indians can go if they want to do so. The number is variously estimated at from 40 to 60 Indians. . . .

"The bill makes provision for them to select allotments in severalty; and if they have Indian villages, which they have not, it allows them to retain those, and it gives them a year's time within which to make selections. . . .

"There are a great many settlers upon that land. It is not practically an Indian reservation. It never has been used for that purpose. The provisions of the bill open the land to settlers after providing, as I stated before, in regard to the Indians, and lands more valuable for timber or mineral deposits shall be entered

under the timber act and the mineral land laws. . . . A few of these Indians live at the mouth of the river. . . .”
23 Cong. Rec. 3918-19 (1892). (Emphasis added.)

Thus, it is eminently clear that Congress, in passing the bill, did not expect that the lands of the former Klamath River Reservation should continue to have reservation status. Indeed, Congress did not even regard these lands as constituting a *de facto* reservation prior to the bill's passage. Based on these legislative statements, Congress understood that the reservation was “abandoned”, that the land thereon “does not constitute an Indian reservation,” and that it “has never been used for that purpose” for many years. This history explains the reference in the first sentence of the 1892 act to lands in “what *was* [the] Klamath River Reservation.” (Emphasis added.) Although this reference is capable of conflicting inferences, the most obvious inference, given similar references in this legislative history, is that Congress no longer regarded the reservation as in existence.

The legal status of the lands on the old Klamath River Reservation site prior to 1892 is not important, of course. What is important is that the congressional understanding of the *de facto* situation at this site explains the intent of Congress in passing the 1892 act. The act was not primarily intended, as contended by the petitioner, to provide for the sale of “parcels” of land which were “surplus” to the Indians’ needs. Brief for the Petitioner (hereinafter “Petitioner”), 19. Rather, “most” of these lands were already in the possession of non-Indian settlers, and the “few” Indians in the area were located in “small villages” at the mouth of the Klamath River. Obviously the purpose of the act was to open up most of the lands in this area for home-

stead settlement, and to allow such settlers to gain a fee patent in their lands; the Indians were to be given allotments which could similarly be converted into fee patents. 25 U.S.C. § 348.

The old reservation area no longer functioned as a reservation, Congress was assured, as the "former" reservation had been, and remained, "abandoned." Such assurances were apparently vital to the bill's passage, as Congress apparently was not inclined to approve a bill which would allow a flood of homesteaders to intrude upon lands which Congress wanted to continue as a reservation; such an intrusion might irreparably disrupt the traditional life patterns of the Indians on the reservation. But Congress approved the bill apparently because it did not expect for these lands to continue as a reservation, because it did not intend to preserve the traditional forms of reservation life in this area. It is significant that, as noted by the U. S. Department of the Interior, many of the Indians left this area after passage of the 1892 act and "were relocated on the connecting strip and elsewhere, and the Klamath River Tribe became widely scattered" (65 I.D. 59, 64 (1958)); given the legislative history behind the act, this result was surely not unintended by Congress. Congress obviously did not regard this result as "unconscionable," as the petitioner asserts it to be (Petitioner, 27), because ample provision was made in the act for the needs of the Indians. But Congress obviously felt that their needs did not require a preservation of the old reservation, or a continuing segregation of the Indians from those in the world beyond the reservation. The petitioner may oppose this congressional policy, but this Court is bound to respect it.

The practical effect of the 1892 act was to bring to a halt any federal supervision of most of the lands of the former

Klamath River Reservation, since most of these lands were now in the hands of the homesteaders. Thus, most of these lands ceased to function as a reservation, if they were so functioning before. As a California appellate court declared in 1966, the old reservation, "for all practical purposes, almost immediately lost its identity as part of the Hoopa Valley Reservation" after the 1892 act. See *Elser v. Gill Net No. One*, 246 Cal. App. 2d 30, 34 (1966). The area lost its resemblance to the neighboring extension located on the upper 20 miles of the Klamath River, where homesteaders continued to be excluded and where the land continued to be used for traditional reservation purposes. Since the 1892 act discontinued these traditional reservation functions in the lower area, but continued them in the upper area, it is difficult to believe that Congress intended for both areas thereafter to be similarly classified as reservations.

At stake in this case are not only California's fishing laws, but also the rights of private landowners who received homestead patents following the passage of the 1892 act. If the old Klamath River Reservation were considered as still in existence, Indians would apparently be allowed to trespass with impunity upon these privately-held lands in exercising their fishing, hunting and trapping rights.² In fact, the present case arises out of a situation in which the petitioner, Mattz, was fishing on privately-owned property.³ But

2. These privately-held lands include what is now the City of Klamath, and certain land owned by the State of California constituting a bridge across the Klamath River which is part of the California highway system.

3. Another case is presently pending in a federal district court in California, awaiting the outcome of this matter, in which a Yurok Indian who resides in San Francisco asserts the right to fish, during summer outings, on privately-owned property in the area encompassed by the former Klamath River Reservation, notwithstanding limitations imposed by California's fishing laws. See *Blake et al. v. Arnett et al.*, No. C-72-2140 (N.D. Cal.).

Congress, in passing the 1892 act, clearly did not intend to sanction this result. According to the House report, Congress intended to dispose of these lands to homesteaders "as are other lands of the same class or quality, under the general laws of the United States." H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892). Thus, Congress fully expected that these homesteaders would acquire an unrestricted fee patent entitling them to the same incidents of ownership as were vested in homesteaders elsewhere. The petitioner's position would drastically curtail some such incidents of ownership, however, and is thus clearly inconsistent with the announced purposes of the 1892 act.

B. Discussion by Petitioner and Amicus Curiae of Legislative History.

The petitioner and the United States, in its amicus curiae brief, seek to dismiss the inferences of the legislative history behind the 1892 act. Both argue that the purpose of the act was merely to protect settlers who had already settled on the lands of the old reservation at the time of the act. Petitioner, 16-17; Memorandum for the United States as Amicus Curiae (hereinafter "United States"), 4-5. It is not clear how this argument supports their position, since most of the lands were already in the possession of such settlers at the time of the act. It should be noted, however, that their argument is based solely on the remarks of Senator Pettigrew in reporting the bill passed by the conference committee. *Ibid.* But Senator Pettigrew, in making these remarks, did not purport to explain the purpose of the act, but only purported to explain the purpose of a minor amendment made by the conference committee which protected the claim of existing settlers unless Indians had settled on their lands at least four months prior to the act. See 23 Cong. Rec. 4245 (1892).

The petitioner also points out that a provision in the original House bill directed that proceeds from land sales would be used to support the removal of the Indians from the old reservation site, and that the Senate deleted the removal provision. Petitioner, 17. However, the bill in its original form did not require the removal of the Indians, but rather provided that the Secretary of the Interior could "reserve" Indian villages and settlements from lands sold to the homesteaders. See 23 Cong. Rec. 1599 (1892). After the 1892 act was passed, many of the Indians were relocated on other reservations anyway (65 I.D. 59, 64 (1958)), and it can hardly be said that the Senate intended for the act to avoid this result.

The petitioner also notes that the Senate amended the House bill to provide for allotments to the Indians. Petitioner, 17. It is not clear how this fact supports his position, in light of the fact, as urged above, that the allotment provision was intended to steer the Indians away from their dependency on reservation life. But it is sufficient to observe that the Senate amendment was already in effect at the time of the above-quoted Senate debate, and it is clear from this debate that the intent and understanding of the Senate was the same as that of the House.

Finally, the petitioner argues that the congressional references to a "former" and "abandoned" reservation were a reference to the old Klamath River Reservation, not to the lower extension of the Hoopa Valley reservation. Petitioner, 17-18. Since these reservations were the same, this is only a semantical argument. Moreover, it is amply refuted by the repeated congressional emphasis of the fact that the area "has never been used" as a reservation for many years, and that the old reservation was abandoned in law

"as it has been in fact." Congress thus expressed its view that, regardless of the area's name or its legal classification, it was not a *de facto* reservation in 1892, and should not be used for reservation purposes thereafter.

Clearly the 1892 act is inconsistent with a continuation of the reservation status of this area, and the old reservation was intended to be thereby terminated.

III. The Present Case Is Distinguishable From That Before the Seymour Court.

The petitioner cites the decision of the Supreme Court in *Seymour v. Superintendent*, 368 U.S. 351 (1962), to support its position that the 1892 act did not terminate the old Klamath River Reservation. In that case, Congress had passed legislation in 1892 which, according to the Court, terminated the reservation status of the northern half of the Colville Indian Reservation in Washington. 27 Stat. 62. The southern half of the reservation was expressly unaffected by the legislation. In 1906, Congress passed additional legislation which gave allotments to Indians "belonging to or having tribal relations on" the southern half of the diminished reservation, and provided that "surplus lands" thereon were to be opened to settlement and entry under the homestead and mining laws. 34 Stat. 80. The *Seymour* Court held that the 1906 act did not discontinue the reservation status of the southern half. Therefore, urges the petitioner, the same result should follow here.

However, the *Seymour* Court did not rule that, as a matter of law, a congressional act does not terminate a reservation if the act opens up the reservation for homestead settlement and provides trust allotments to the Indians. To the contrary, the Court did not rely on these facts as a basis for its decision; this suggests, as urged above, that these

facts militate towards the opposite conclusion. Instead, the Court based its decision on other terminological signals contained in this and later acts. Specifically, the Court concluded that the 1906 act did not terminate the reservation because (1) the 1906 act repeatedly referred to the "diminished Colville Indian Reservation" in a manner suggesting that the reservation, as so diminished, was to continue, (2) the 1906 act failed to provide, as had the 1892 Colville act,⁴ for restoration of lands to the "public domain," (3) the 1906 act provided that proceeds of the land sales would be used for the Indians' benefit, and (4) subsequent legislation shows a consistent congressional understanding that this area continued to have reservation status.

The major distinction between this case and the *Seymour* case consists of an additional factor not present in *Seymour*, that is a legislative historical record clearly showing that Congress did not intend for the reservation status of the area to survive the act. This record outweighs all the other facts relied on by the *Seymour* Court in evaluating the mind of Congress. If such a record had been present in *Seymour*, the Court likely would have reached a different result.

A. Comparison of *Seymour* and This Case.

Aside from the inferences of the legislative historical record, the facts relied on by the *Seymour* Court are distinguishable from those present here. The Court particularly noted that the 1906 Colville act repeatedly referred to

4. For purposes of differentiation, the 1892 act relating to the former Klamath River Reservation will sometimes be referred to as the "1892 Klamath River act," the 1892 act relating to the northern half of the Colville reservation as the "1892 Colville act," and the 1906 act as the "1906 Colville act."

the "diminished Colville Indian Reservation," thus suggesting that Congress intended for the reservation to continue. 368 U.S. at 355. No similar language is contained in the 1892 Klamath River act; to the contrary, the latter act referred to lands "in what *was* [the] Klamath River Reservation," thus suggesting that this area was not to continue as a reservation. (Emphasis added.) Also, the 1892 Klamath River act repeatedly referred to "land" or "lands" affected by the act, thus seeming to avoid the use of the word "reservation."⁵ For instance, the act directed that proceeds from land sales were to be used for the benefit of Indians on the "lands" affected by the act, whereas the 1906 Colville act directed that such proceeds were to be used for the benefit of Indians on the "Colville Indian Reservation."

Additionally, the emphases of the 1906 Colville act and the 1892 Klamath River act are entirely different. The 1906 Colville act provided at the outset for allotments to the Indians, and then provided for sale of "unallotted" lands to non-Indian settlers; the unallotted lands were described in the act as "surplus." Conversely, the 1892 Klamath River act, at the outset, provided for sale of "*all* lands" to such settlers, and subsequently set forth exceptions to this general proposition in providing for Indian allotments; nowhere in the act were the lands available to the settlers described as "surplus." (Emphasis added.) This different emphasis in the acts shows that the primary purpose of the 1892 Klamath River act, to a degree not present in the 1906

5. The 1892 Klamath River act made a single reference to Indians "now located on said reservation," but this phrase merely referred back to the earlier reference in the act to "lands embraced in what *was* [the] Klamath River Reservation." The use of the past tense in the latter phrase indicates that the former phrase was not intended to imply that these lands should continue to be regarded as a reservation.

Colville act, was to provide for homestead settlement of the area.

B. The "Public Domain".

The *Seymour* Court also noted that the 1906 Colville act, unlike the 1892 Colville act, failed to provide that lands sold to homesteaders were restored to the "public domain." 368 U.S. at 355. This phrase was similarly absent from the 1892 Klamath River act. However, the *effect* of the 1892 Klamath River act was to restore these lands to the public domain. The above-quoted legislative history shows that the lands opened up for settlement were to be "disposed of, as are other lands of the same class or quality, under the general laws of the United States" (H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892)); thus, under the homestead laws, the settlers acquired a fee title to these lands, which, as noted above, consisted of "most" of the lands of the former reservation. Therefore, whatever the choice of language, these lands were given over to private ownership, and were effectively restored to the public domain. It may thus be concluded that Congress did not insert the "public domain" phrase in the 1892 Klamath River act not because of its potential effect on the area's reservation status, but because of its redundancy.

That the effect of the 1892 Klamath River act was to restore the homesteaded lands to the public domain has been conceded by the United States in another proceeding. In *Short v. United States*, No. 102-63, a case pending in the U.S. Court of Claims, Ramsey Clark, then Assistant Attorney General for the United States, filed a brief in support of the United States' motion to dismiss for lack of jurisdiction. The brief stated, at page 3,

"The Act of June 17, 1892, 27 Stat. 52, *restored the Klamath River Reservation to the public domain* after first authorizing allotments to Indians residing thereon and authorizing the creation of Indian villages. As a result of this Act, *no tribal lands remain on the Klamath River Reservation*, except the Indian villages." (Emphasis added.)⁶

This statement refutes the underlying basis for the amicus position asserted by the United States herein, and indeed shows that the United States formerly considered the old Klamath River Reservation as no longer in existence.

Above all, it should be remembered that the *Seymour* Court did not regard the "public domain" phrase as a necessary word of art in the termination of an Indian reservation. Certainly there is no indication that Congress has ever so viewed the phrase. Rather, the phrase is merely one manifestation of the congressional intent, and the legislative historical record in this case is another manifestation which should be heavily considered by this Court.

C. Proceeds to the Indians.

The *Seymour* Court mentioned other facts in support of its decision, facts which are clearly less important than those discussed above. For instance, the Court noted that the proceeds of the land sales were to be deposited in the U. S. Treasury for the use of Indians remaining on the reservation. This procedure is essentially similar to the disposition of such proceeds under the 1892 Klamath River act. But it is also largely similar to the procedure for disposing of such proceeds under the 1892 Colville act; this latter act provided that such proceeds should be set aside in the U. S. Treasury, and that, although Congress could ultimately

6. A copy of this brief has been filed with the Clerk of the Supreme Court, and another copy has been provided to the petitioner.

appropriate the proceeds for the public use, the proceeds in the meantime were to be used for the benefit of the Indians. Since the *Seymour* Court held that this latter enactment effectively dissolved the northern half of the Colville reservation, it is apparent that the use of such proceeds for the Indians' benefit is a fact that, although subject to consideration, is not entitled to major significance.

D. Legislation Subsequent to 1892.

The *Seymour* Court also noted that, beginning 10 years after the 1906 Colville act, in 1916, legislation enacted by Congress frequently referred to the diminished Colville reservation in a manner suggesting that the reservation was to continue in effect.⁷ But the only congressional references cited by the petitioner relating to the Klamath River Reservation consist of enactments in 1942 and 1958. See 56 Stat. 1081, 25 U.S.C.A. § 348a; 72 Stat. 121. This Court has noted, as the petitioner has conceded (Petitioner, 19, n. 8), that subsequent legislation is entitled to little weight in construing prior enactments. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); see *United States v. Wise*, 370 U.S. 405 (1962). This is especially true where, as here, the later act was passed at least 50 years after the earlier act.

Also, it is not clear that Congress regarded the former Klamath River Reservation as in existence at the time of the passage of the 1958 enactment. Under this enactment, a small area on the old reservation was "restored" to tribal ownership, and such lands were "added to and made a part of the existing reservations." 72 Stat. 121. If the old reser-

7. The Court cited eight such references. See 368 U.S. at p. 356, n. 12.

vation were still in existence in 1958, such lands would already be a part of the reservation and there would be no necessity to "add [such lands] to" the reservation.

Moreover, the 1958 enactment was passed after the 1953 legislation giving California authority over certain offenses committed by Indians in "Indian country" (18 U.S.C. § 1162), and Congress would undoubtedly have provided a clearer expression of its intent if it thereby intended to deprive California of authority to enforce its fishing laws in this area. The 1942 legislation, which reimposed federal trusteeship over certain allotments, merely referred to the old reservation in identifying the area in which the allotments were located. Little significance should be attached to either enactment in determining whether Congress intended to terminate the reservation in 1892.

E. Comparison of the Two 1892 Acts.

Perhaps the differences between this case and the *Seymour* case can be illuminated more clearly by focusing on the 1892 Colville act, which the *Seymour* Court held to have discontinued the reservation status of the northern half of the Colville reservation. That act is virtually identical to the 1892 Klamath River Act. Both acts provided for entry and settlement of unallotted lands under the homestead laws. The 1892 Colville act provided that these lands should be disposed of "under the general laws applicable to the disposition of public lands;" although this language was absent from the 1892 Klamath River act, similar language was inserted in the House report which explained the latter act. See H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892). Both acts authorized selected lands to be "reserved" for the Indians' benefit from the land made available to home-

steads. Both provided for allotments to Indians "residing" on the lands; by way of contrast, the 1906 Colville act provided for allotments to Indians "belonging to or having tribal relations" on the reservation, not just to those residing on the land. Both acts provided that proceeds from the disposition of these lands would be used for the Indians' benefit, although the 1892 Colville act reserved the right of Congress to eventually use these proceeds for the public benefit. The only essential difference between the acts consists of the absence of the "public domain" phrase in the 1892 Klamath River act; but as noted earlier, the effect of this latter act was to restore most of the lands to the public domain and thus the phrase would have been redundant, especially in view of the legislative history behind the act. Both 1892 acts were passed by the same Congress, the Fifty-Ninth; that the same Congress passed two acts with virtually identical effects, within two weeks of each other, strongly indicates that both acts were similarly intended to terminate the reservation status of the affected area.

At the very least, the *Seymour* Court's construction of the 1892 Colville act refutes the petitioner's contention that Indian reservations are not terminated except by language to the effect that the reservation is "terminated" or "discontinued" (Petitioner, 11), and shows that Congress' intent must occasionally be examined in order to determine the results of its work. Other federal courts have also considered the effect, in addition to the language, of laws or treaties in order to determine whether a reservation was meant to be discontinued. See, e.g., *Tooisgah v. United States*, 186 F.2d 93 (10th Cir. 1950); *Ellis v. Page*, 351 F.2d 250 (10th Cir. 1965); *De Marrias v. State of South Dakota*, 206 F.Supp. 549 (D.S.D. 1962), *aff'd* 319 F.2d 845 (8th Cir. 1963); *United States v. La Plant*, 200 Fed. 92 (D.S.D. 1911).

IV. The Federal "Rulings" Cited by the Petitioner Have No Significance in Interpreting the 1892 Act.

The petitioner has referred to two federal "rulings," consisting of a 1972 opinion of the U. S. Court of Claims and a 1958 opinion of the U. S. Department of the Interior, which purportedly support his position. See Petitioner, 22-24; *Short v. United States*, No. 102-63 (Ct. Cl.); 65 I.D. 59 (1958). Both opinions are of fairly recent vintage, and thus have no historical significance in explaining the congressional intent behind the 1892 act. Moreover, both opinions were concerned with questions other than that presented here, and in neither matter did an interested party apparently make a presentation to the effect that the old Klamath River Reservation was no longer a reservation.

In *Short*, the trial commissioner merely issued a recommended opinion for adoption by the court, and the court has apparently not yet adopted the opinion. Additionally, the trial commissioner's opinion contains neither a holding nor dictum that the reservation status of the area was not terminated, but merely assumes this to be the case; this seems an unhealthy assumption in view of Ramsey Clark's brief submitted to the commissioner, discussed above, which concludes that the 1892 Klamath River act restored the reservation to the "public domain."

The opinion of the Department of the Interior fleetingly notes that the former Klamath River Reservation is "technically" a part of the Hoopa Valley reservation. 65 I.D. at 64. However, no reasons are offered in support of this brief statement. The statement seems impeached by the very facts presented in the opinion, since the opinion also states that the 1892 act "discontinued the Klamath River Reservation as such," and that thereafter "Indians who removed from

the Klamath River Reservation were relocated on the connecting strip and elsewhere, and the Klamath River tribe became widely scattered." *Ibid.* Clearly neither of these opinions are helpful in supporting the petitioner's position. opinions are probative in determining the question before this Court.

V. A 1909 Map Issued by the Federal Government Shows That the Area in Question Lost Its Reservation Status in 1892.

The executive branch of the federal government apparently took the position in 1909 that the 1892 act terminated the reservation status of the old Klamath River Reservation. President Theodore Roosevelt issued a proclamation that year which altered the boundaries of the Trinity National Forest in California. Two maps, compiled by the Forest Service of the U. S. Department of Agriculture, were affixed to the proclamation. See 35 Stat. 2243; Sen. Doc., vol. 27, 62d Cong., 2d Sess. (3 Indian Affairs: Laws and Treaties), 646-49 (1909).⁸ These maps, particularly the small scale map (*id.* at 648), show the boundaries of an area covering the *upper* twenty miles of the Klamath River, which is described thereon as the "Hoopa Valley Indian Reservation." A boundary line is clearly drawn on the maps at the northern end of this extension of the Hoopa Valley reservation, which differentiates this extension from the *lower* twenty miles of the river. Hence, these maps unequivocally show that the reservation status accorded to the upper twenty miles of the river is not similarly accorded to the lower twenty miles. The maps are particularly significant in that, by virtue of their publication in 1909, they are

8. A copy of the proclamation and maps are attached hereto as Appendix A.

fairly contemporaneous with the 1892 act. Also, since the maps were incorporated in a presidential proclamation, they represent an expression by the highest executive officer in the federal government.

The petitioner has called the Court's attention to an earlier map of the U. S. Department of the Interior, dated 1892, which assertedly shows the area in question to be a reservation. Petitioner, 24; see Appendix to Sixty-First Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1892). But this map was clearly prepared prior to the 1892 act which we believe discontinued the reservation status of the area. This map shows the Colville reservation in Washington as including the old northern half of that reservation; but Congress passed the 1892 Colville act discontinuing the reservation status of the northern half of that reservation, within two weeks of the time that it passed the 1892 act relating to the Klamath River Reservation. Since the map was apparently prepared prior to the former act, it was apparently prepared prior to the latter act. Hence, this map is of no significance in illuminating Congress' intent in passing the 1892 Klamath River act.

The 1909 maps are not the only cartographic expressions by the federal government concerning the status of the old Klamath River Reservation. To the contrary, the U. S. Geological Survey, a branch of the Department of the Interior, has published many maps which similarly show a boundary line excluding the lower twenty miles of the Klamath River from the extension of the Hoopa Valley reservation.⁹ The

9. A copy of the relevant part of one such Geological Survey map, published in 1970, is attached hereto as Appendix B. The original of this map, and the original maps referred to below as Appendices C and D, and the affidavits of the appropriate federal custodians certifying the maps to be official records, have been filed with the Clerk of the Supreme Court.

Geological Survey maintains and periodically updates official maps, referred to as the quadrangle series, which are the basis for the other maps which it compiles; the quadrangle map for the area in question, dated 1952, contains a boundary line for the Hoopa Valley reservation extension which clearly excludes the lower twenty miles from the extension." Also, the U. S. Forest Service, a branch of the Department of Agriculture, published a map in 1972 which excludes this area from the reservation extension."

The petitioner has cited a 1971 map of the U. S. Bureau of Indian Affairs, and the map of the U. S. Department of the Interior published in the National Atlas in 1970, which show the boundary of the reservation extension as including the lower twenty miles of the river. Petitioner, 25. It might be well to disregard these maps in view of the fact that they were published after the pending matter was filed, since certainly the Department of the Interior cannot cartographically lift itself up by its own bootstraps. At best, these maps merely show the Department's confusion concerning the status of the old Klamath River Reservation, and hence refute the petitioner's argument that the Department has maintained a consistent position concerning the reservation status of the area.

VI. 18 U.S.C. § 1151 Does Not Imply That the Old Klamath River Reservation Continued in Existence After 1892.

The United States, in its amicus brief, also makes reference to 18 U.S.C. § 1151, a 1948 enactment which defines "Indian country" to include a "reservation" . . . notwithstanding the issuance of any patent." United States, 7-8.

10. A copy of this quadrangle map is attached hereto as Appendix C.

11. A copy of the relevant part of the Forest Service map is attached hereto as Appendix D.

Citing the *Seymour* case, the United States argues that the quoted language was intended to prevent a checkerboard of jurisdictions, and thus that the language would be meaningless if the opening up of a reservation to settlement terminated the reservation status of the area. However, the *Seymour* Court only held that, *once a reservation is determined to exist*, section 1151 requires all lands—whether patented or not—to be included as part of the reservation, in order to avoid a jurisdictional checkerboard. But the Court carefully avoided relying on section 1151 in making its initial determination whether the reservation itself was in existence, and instead looked to the congressional intent surrounding the relevant legislation. The United States has either misread or ignored the basic distinction which the *Seymour* Court itself made in interpreting section 1151.

There are two possible reasons for the distinction made by the *Seymour* Court in interpreting section 1151. First, the Court undoubtedly realized that a 1948 congressional enactment could not change the congressional intent surrounding a 1906 enactment. Secondly, and more importantly, section 1151 only provides that, if a reservation is created, all lands therein shall be considered a part of the reservation in order to avoid the unnecessary creation of federal enclaves within areas regulated by the state; it does not provide that, if a reservation is terminated, such federal enclaves shall be avoided. To phrase the proposition differently, the section prevents the creation of state enclaves on reservation lands, not the creation of federal enclaves on non-reservation lands. In fact, the section differentiates, in subdivisions (a), (b) and (c), between a "reservation," "dependent Indian communities" and "trust allotments"; this differentiation shows that Indian villages or trust allot-

ments can be located on non-reservation lands, a situation which necessarily results in the creation of federal enclaves on state-regulated lands. Also, the General Allotment Act of 1887 authorized trust allotments to be created on non-reservation lands (25 U.S.C. § 334), and thus also results in the creation of such federal enclaves. These provisions are based on the premise that Congress, if it wishes, can return reservation lands to the states, and necessarily creates federal enclaves with respect to any areas thereon that it sets aside as Indian villages or trust allotments. See *De Marrias v. State of South Dakota*, 206 F.Supp. 549, 553 (D.S.D. 1962), *aff'd* 319 F.2d 845 (8th Cir. 1963). When the northern half of the Colville reservation was terminated in 1892, for instance, the Indian villages and trust allotments thereon became federal islands within the jurisdictional sea of Washington. This result merely recognizes that, under certain circumstances, a state's interest in exercising its normal governmental functions over lands within the state, such as homesteaded lands, outweighs the jurisdictional inconvenience created by such federal enclaves. It would be unfair, for instance, to deprive California of its right to enforce its fishing laws to protect the Klamath River fishery merely because of the inconvenience of occasionally identifying the location of an Indian village or trust allotment. Certainly it was not the intent of Congress, in passing the 1892 act, to withhold this right from the state.

CONCLUSION

California has no interest in whittling away the rights of Indians which are secured under federal law. But we believe that the rights asserted by the petitioner are not, and since 1892 have not been, in existence. California's primary inter-

est in applying its fishing laws to the Indians is to protect the fishery, particularly the salmon fishery, in the Klamath River. Undisputed evidence at the trial shows that the use of gill nets, such as those used by the petitioner, are particularly harmful to salmon. Appendix, 27-28. The Court should be hesitant to exempt the Indians, or any other person, from the application of a state law designed to protect the general welfare by conserving a valuable fish resource. See *Puyallup Tribe v. Department of Fish and Game*, 391 U.S. 392, 399 (1968).

The petitioner has previously argued in this case that the white man poses a greater threat to the conservation of fisheries than the Indians, since the white man builds the dams, roads and other structures which threaten fish life. Perhaps the sheer force of the white man's progress makes this unhappily true; but in the situation before the Court, California is attempting, and for many years has successfully attempted, to conserve the Klamath River fishery by regulating the fishing activities of all, Indians and others, who take fish from the river.

In fact, California imposes far more stringent standards on non-Indians than on Indians with respect to fishing in the Klamath River. California recognizes the unique economic and cultural problems of the Yuroks who reside on the river, and has relaxed the fishing standards applicable to these Indians. Under California Fish and Game Code section 7155, adopted in 1957, the State Department of Fish and Game issues permits to Yurok Indians to fish along the Klamath River "for subsistence purposes only." Under the section, Yuroks may take fish at any time of the year, but only by hand dip nets or hook and line. Daily bag limits are imposed for salmon, trout and sturgeon, but not for other

types of fish. The Yuroks are not permitted to sell the fish taken, and thus are not permitted to become entrepreneurs at the expense of the fishery; it is doubtful if this result would follow if the area were held to be a reservation. See *Donahue v. Justice Court*, 15 Cal. App. 3d 557, 563 (1971).

California has made a genuine and long-standing effort to reconcile the competing needs of the Yuroks and the needs of the Klamath River fishery. The Court should decline to upset this reconciliation, and should respect California's efforts to protect this vital and irreplaceable resource. Certainly Congress did not intend in 1892 for this area to continue as a reservation. The Court should affirm the decision of the California appellate court.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General of the
State of California

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Attorneys for Respondent

2, 1909.
Part 2, 2363.

National For-
Part 1, 2335.

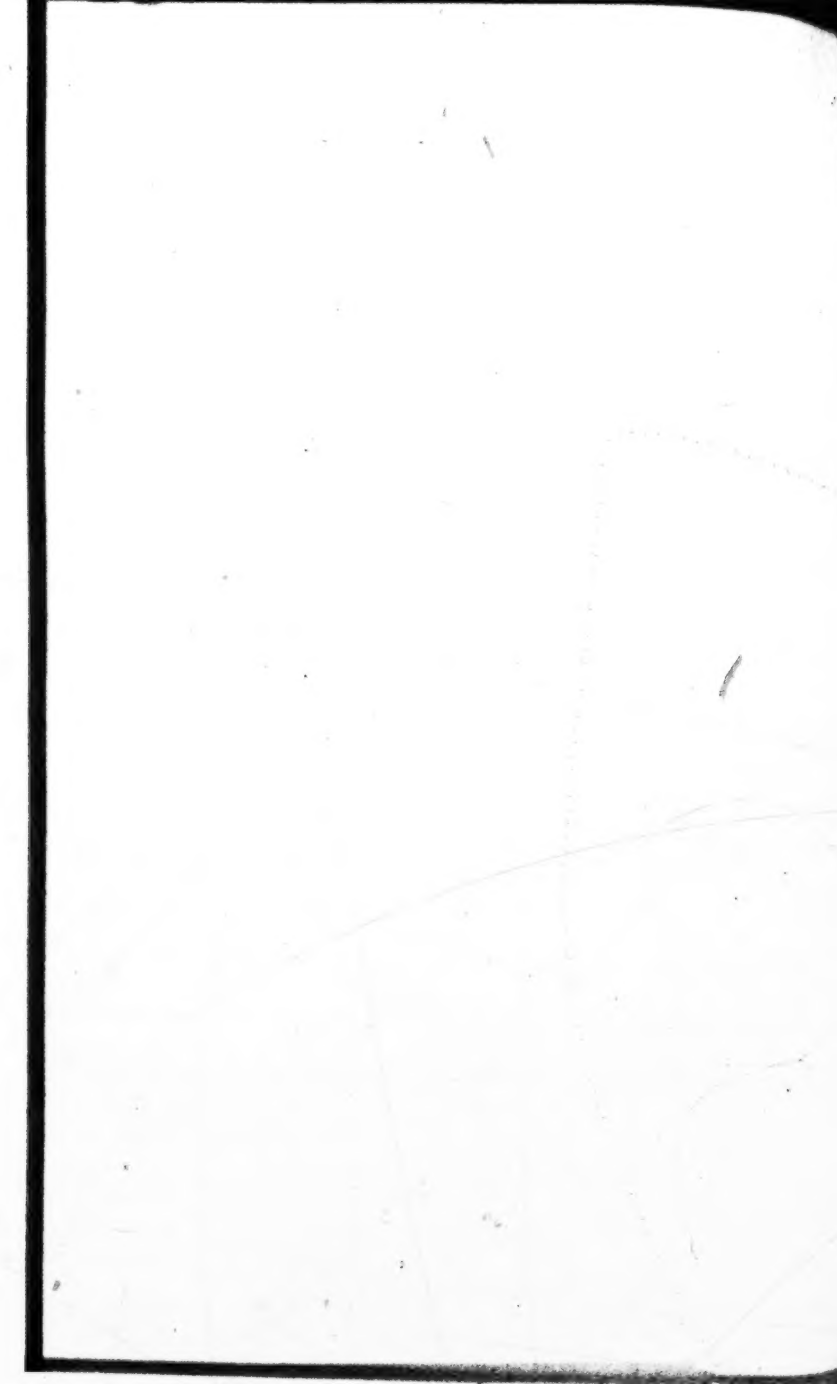
enlarged.
1909.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
A PROCLAMATION

WHEREAS, an Executive Order dated July second, nineteen hundred and eight, changed the boundaries of the Trinity National Forest to embrace portions of the Trinity, Shasta, Klamath, and Stony Creek National Forests;

And whereas, it appears that the public good will be promoted by including in the Trinity National Forest certain lands within the State of California, shown on the diagram hereto attached and forming a part hereof, which are in part covered with timber, and which constitute a part of the Hoopa Valley Indian Reservation, established by Executive Order dated June twenty-third, eighteen hundred and seventy-six, and modified by subsequent Orders;

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by the Act of Congress, approved June fourth, eighteen hundred and ninety-seven, entitled, "An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen



hundred and ninety-eight, and for other purposes," do proclaim that the said lands are hereby added to the Trinity National Forest and that the boundaries of said National Forest are now as shown on the two parts of the said diagram, and such National Forest so enlarged

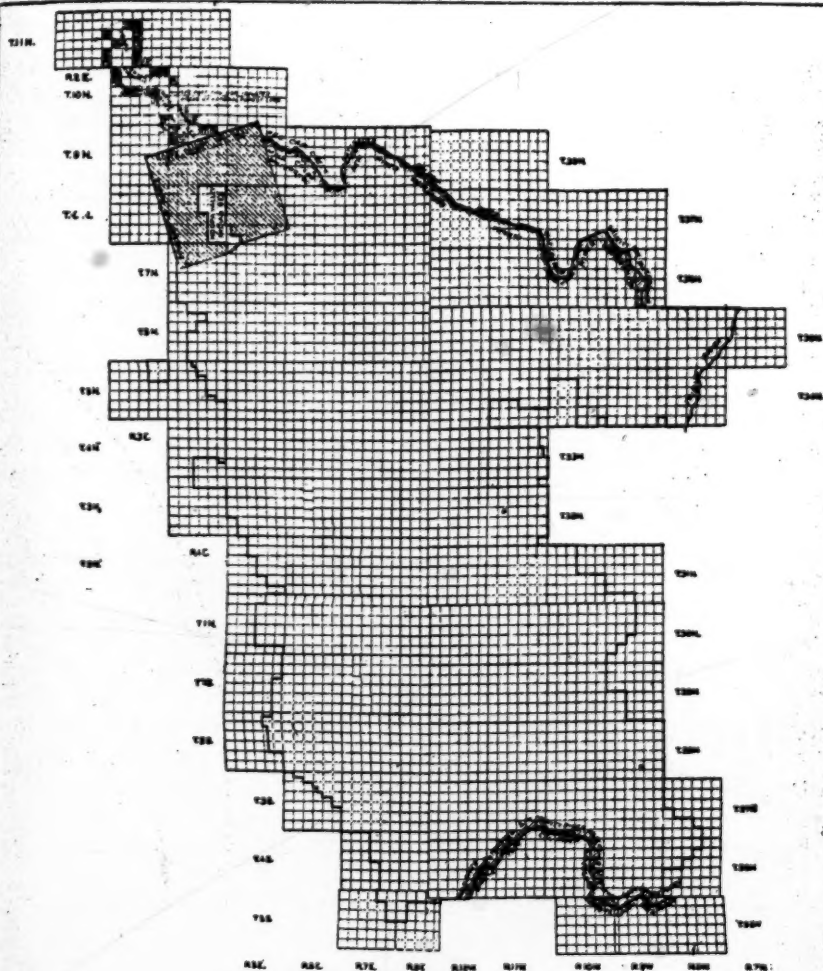


DIAGRAM IN TWO PARTS
PART ONE OF DIAGRAM

FOREST SERVICE U.S. DEPT. OF AGRICULTURE
1908.

TRINITY NATIONAL FOREST CALIFORNIA

WE CHASE MOUNTAIN AND BASE - MOUNTAIN MOUNTAIN AND BASE

FOREST SERVICE U.S. DEPT. OF AGRICULTURE

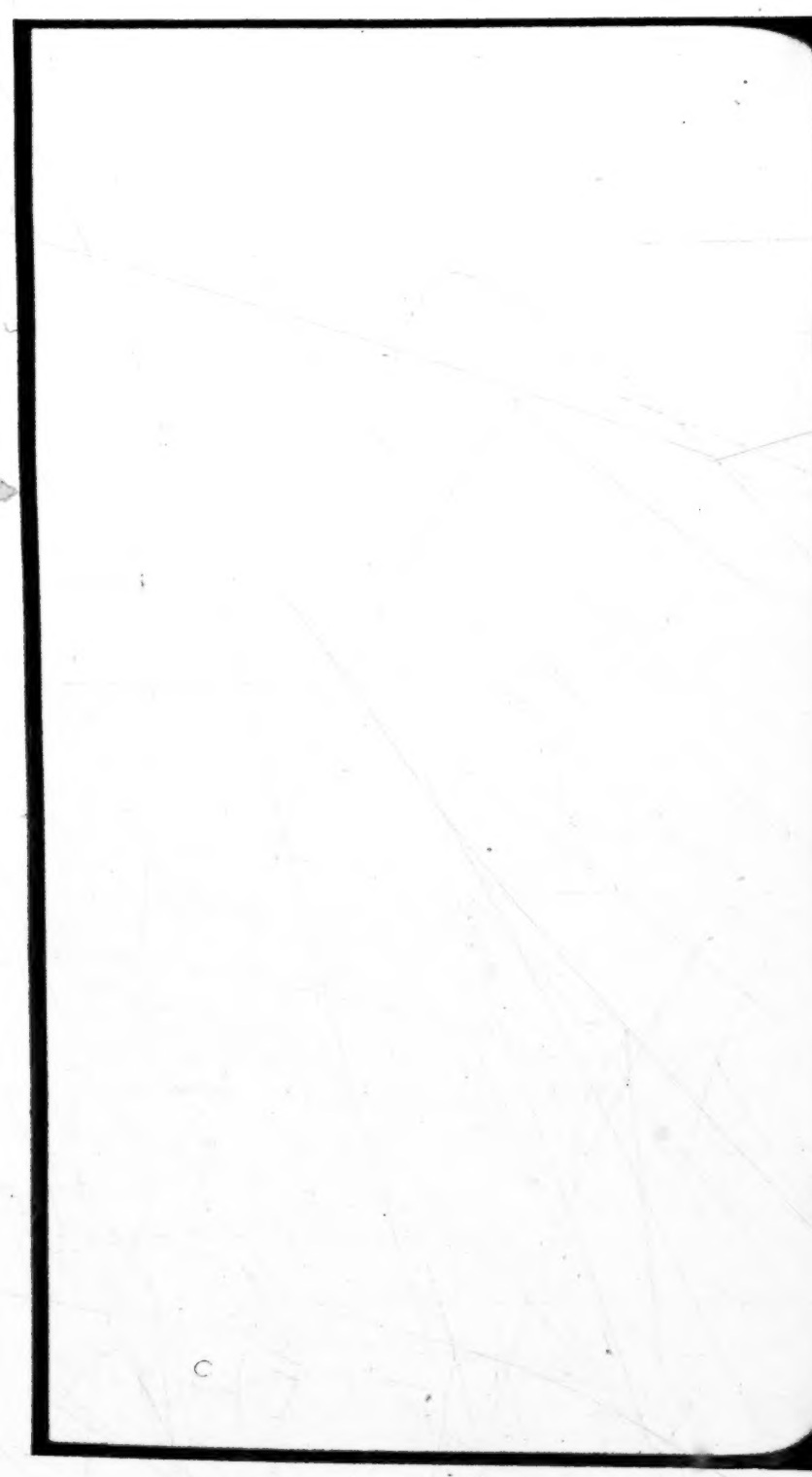
DIAGRAM IN TWO PARTS

ADDITIONAL SEC. PARTS ONE AND TWO

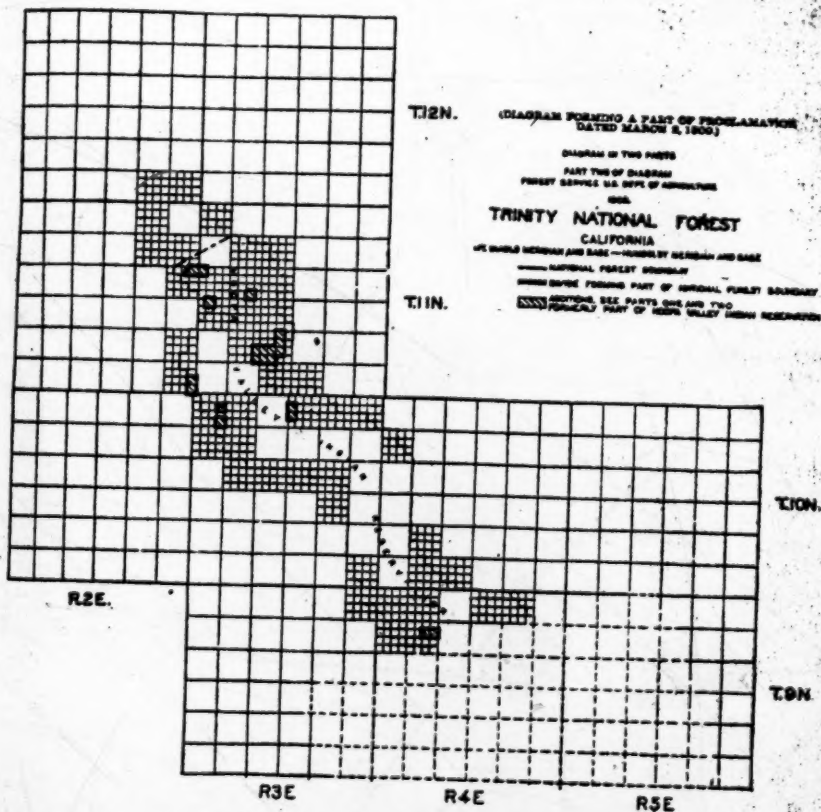
FORMERLY PART OF MOUNTAIN MOUNTAIN AND BASE

DIAGRAM FORMERLY A PART OF MOUNTAIN MOUNTAIN AND BASE

DIAGRAM FORMERLY A PART OF MOUNTAIN MOUNTAIN AND BASE



rights of the Secretary of the Interior and of the Commissioner of Indian Affairs, under existing laws, to allot to individual Indians any of such of the above described lands as were included in the said Hoopa Valley Indian Reservation by the said Executive Order modified as aforesaid; to use any of such lands or the timber thereon for Agency, school, or other tribal purposes; to permit the use of any of such lands for grazing purposes; to permit the free use by individual Indians of timber and stone from any of said lands necessary for domestic use upon their allotments; to dispose of the proceeds arising from grazing as provided for by law for other Indian



funds; and to dispose of the dead timber standing or fallen upon such lands; *Provided further*, that said powers and rights of the Secretary of the Interior and Commissioner of Indian Affairs or permittees under or through them or either of them, and of individual Indians, except as to allotments to such Indians, shall be subject to such rules and regulations as the Secretary of Agriculture may from time to time prescribe for the protection of the National Forest; and said powers and rights shall not be construed to apply to any land except such parts of said Hoopa Valley Indian Reservation as are included in the Forest by this proclamation, and all said powers and rights

except the rights of individual Indians and their heirs to hold and enjoy their allotments, shall cease and determine twenty-five years after the date hereof, and thereafter the occupancy and use of the unallotted parts of said lands shall in all respects be subject to the laws governing National Forests.

The withdrawal made by this proclamation shall, as to all lands which are at this date legally appropriated under the public land laws or reserved or used for Indian Agency, school, or church purposes, or reserved for any public purpose other than for Indian occupancy and use under such Executive Orders, be subject to, and shall not interfere with, or defeat legal rights under such appropriation, or prevent the use for such public purpose of lands so reserved, so long as such appropriation is legally maintained, or such reservation remains in force.

Prior rights not affected.

This proclamation shall not prevent the settlement and entry of any lands heretofore opened to settlement and entry under the Act of Congress approved June eleventh, nineteen hundred and six, entitled, "An Act to provide for the entry of Agricultural lands within forest reserves."

Agricultural lands.
34 Stat., 233.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this second day of March, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-third

[SEAL]

THEODORE ROOSEVELT

By the President:

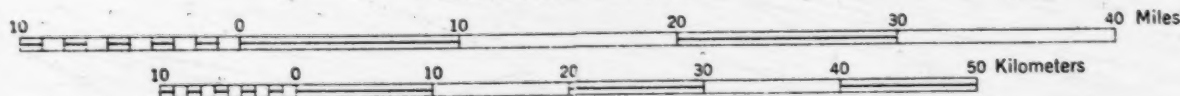
ROBERT BACON

Secretary of State.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

STATE OF CALIFORNIA NORTH HALF

Scale 1:500,000
1 inch equals approximately 8 miles



Contour interval 500 feet
Dotted line represents the 100-foot contour
Datum is mean sea level
Depth curves at 100-fathom interval
Datum is mean lower low water

Compiled, edited, and published by the Geological Survey. 1927 North American datum
Lambert conformal conic projection based on standard parallels 33° and 45°

LEGEND

- Capital — Interstate highway
- Seat — U. S. highway
- Town, or village — State highway
- Unimproved service airport — Other principal roads
- Area shown for towns over 25,000 population
- Boundary — National forest
- National park — Indian reservation
- Natural wildlife refuge

SOURCE DATA

U. S. Dept. of the Interior-Geological Survey topographic maps
U. S. Dept. of the Army-Corps of Engineers topographic maps
Geological Society of America-Submarine topography of the Calif. coast,
based in part on U. S. Coast & Geodetic Survey data
State of California-Dept of Water Resources maps

BASE MAP WITH HIGHWAYS AND CONTOURS

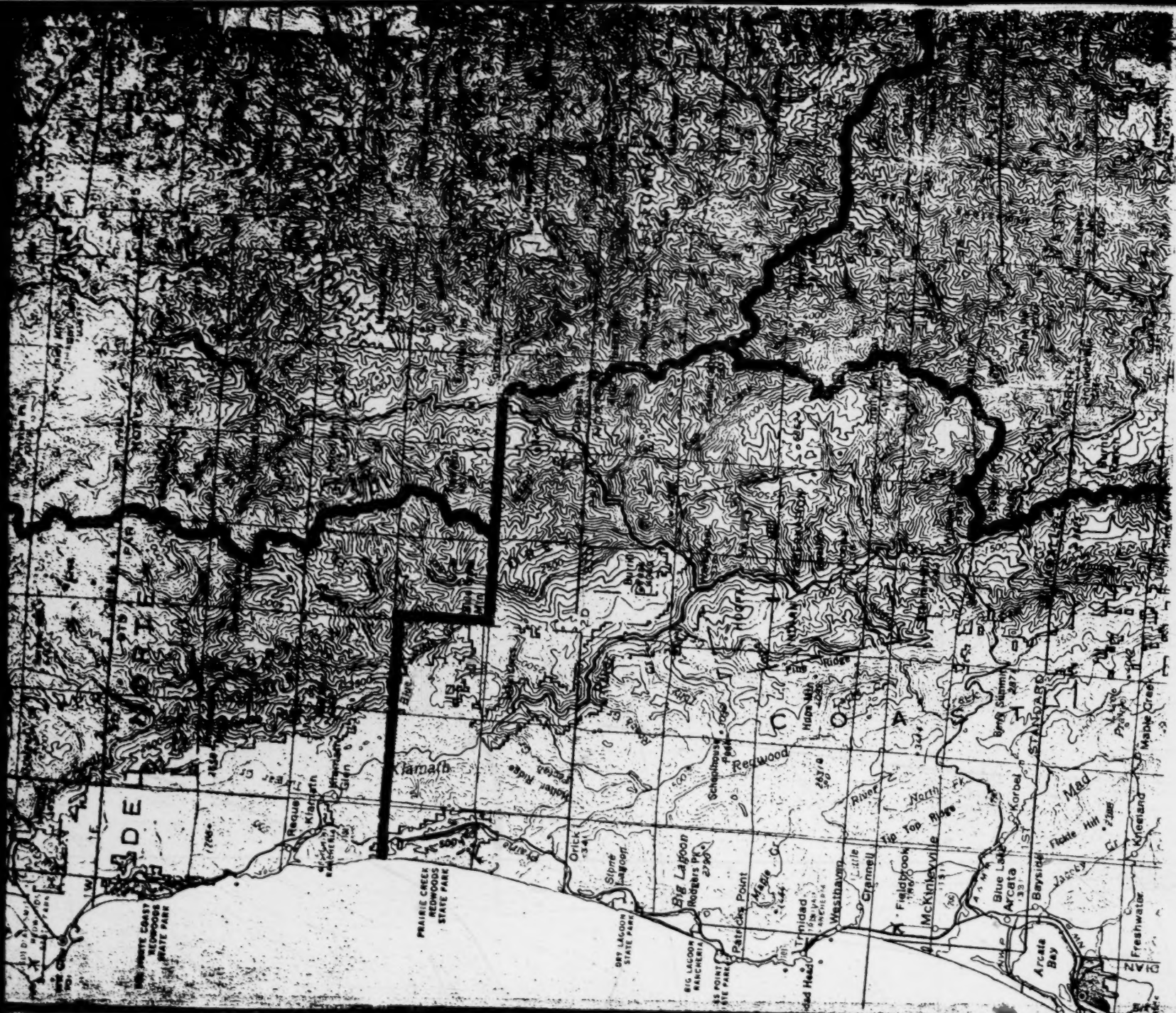
POPULATION KEY

LOS ANGELES more than 200,000
PASADENA 100,000 to 200,000
Concord 25,000 to 100,000
Redding 5,000 to 25,000
Bishop less than 5,000

Population indicated by size of letters

FOR SALE BY U. S. GEOLOGICAL SURVEY, DENVER, COLORADO 80225 OR WASHINGTON, D. C. 20242
COMPILED IN 1968
EDITION OF 1970
HIGHWAYS CORRECTED TO 1969

APPENDIX "B"



THE MOUNTAIN COAST
REDWOODS
STATE PARK

PRAIRIE CREEK
REDWOODS
STATE PARK

BIG LAGOON
STATE PARK

Big Lagoon
Roberts Pt.
2750'

Patrick's Point

Trinidad

Westhaven

Fieldbrook

McKinleyville

Arcata

Blue Lake

Bayside

Mad

Freshwater

MAP TO ACCOMPANY
MULTIPLE USE MANAGEMENT REVIEW
OF UNDEVELOPED ROADLESS AREAS IN


CALIFORNIA


SCALE 1" = APPROX. 16 MILES


1972


LEGEND

 NATIONAL FORESTS

 EXISTING WILDERNESSES, WILD RIVER, AND PRIMITIVE AREAS

 EXISTING NATIONAL PARKS, MONUMENTS, SEASHORES, RECREATION AREAS, WILDLIFE REFUGES AND STATE PARKS, MONUMENTS, RECREATION & WILDLIFE AREAS

 CURRENT ROADLESS, UNDEVELOPED AREAS WITHIN THE NATIONAL FORESTS

 TENTATIVE CANDIDATE STUDY AREAS

1 CUCAMONGA EXTENSION

2 SHEEP MTN.

3 LADEUX

4 GOLDEN TROUT GREY MOSES

5 WHITE MOUNTAINS

6 ISH

7 MARBLE MTN. REVISIONS

8 SHINBONE

9 MT. SHASTA

10 CASTLE CRAGS

11 RED MTN.

12 CARSON-ICEBERG

13 MOKELUMNE EXTENSION

ANGELES N. F.

ANGELES N. F.

ELDORADO N. F.

INYO & SEQUOIA N. F.

INYO N. F.

LASSEN N. F.

KLAMATH N. F.

MENDOCINO N. F.

SHASTA-TRINITY N. F.

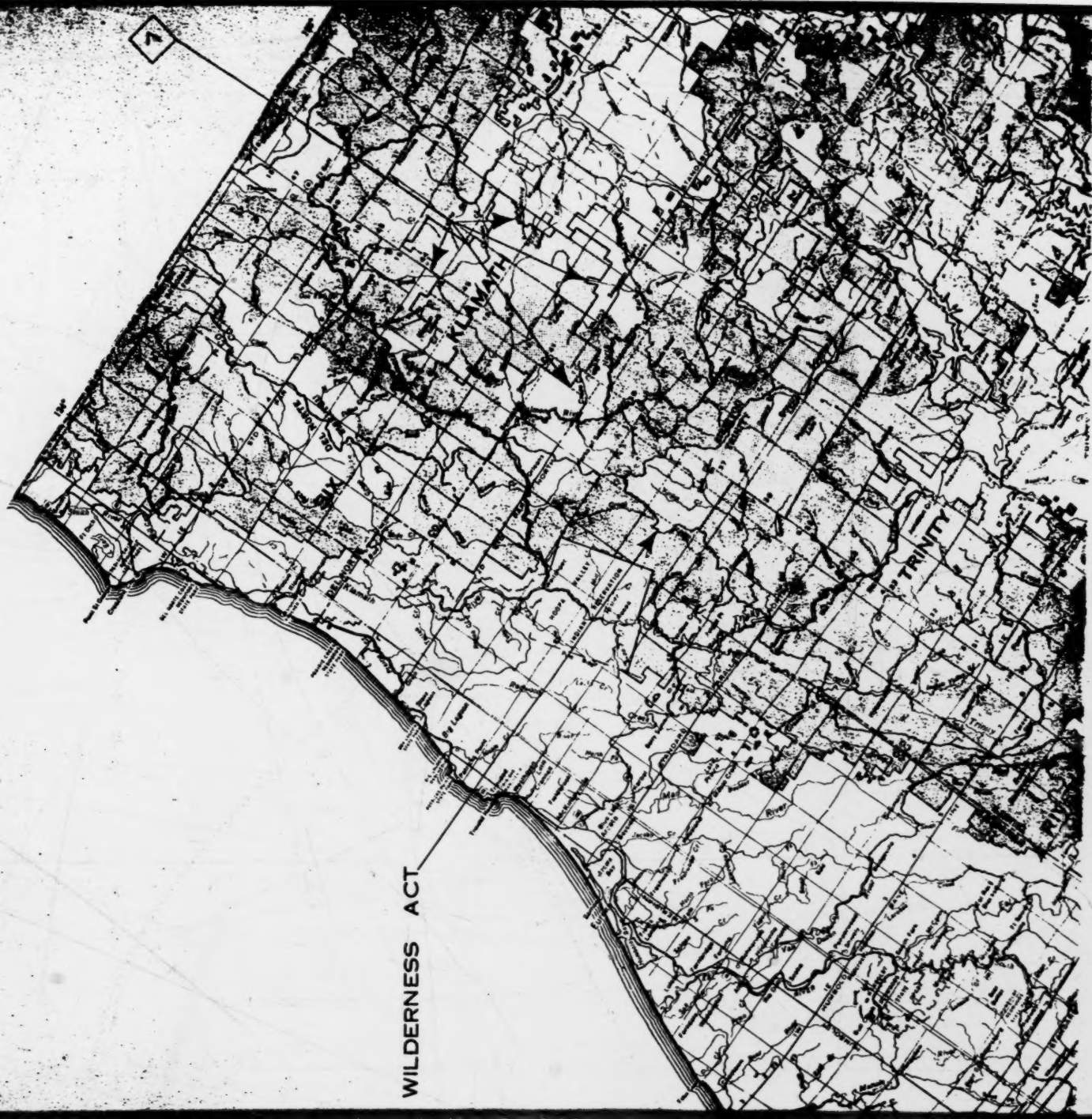
SHASTA-TRINITY N. F.

SIX RIVERS N. F.

STANISLAUS N. F.

STANISLAUS N. F.

APPENDIX "D"



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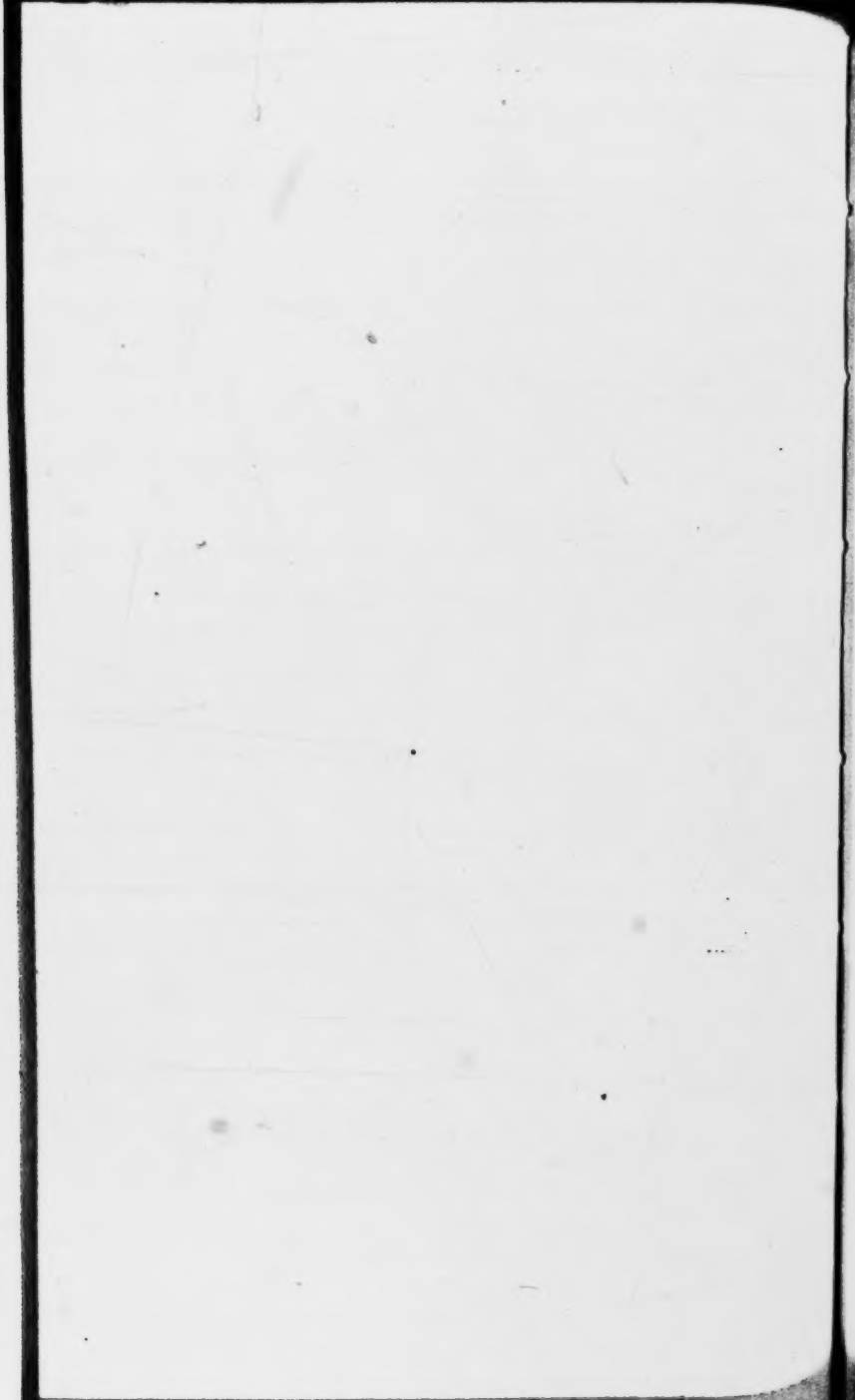
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1182

RAYMOND MATTZ,
PETITIONER

v.

G. RAYMOND ARNETT, AS DIRECTOR OF
THE DEPARTMENT OF FISH AND GAME
OF THE STATE OF CALIFORNIA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA, FIRST APPELLATE
DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

ARGUMENT

I

TERMINATION REQUIRES SPECIFIC
STATUTORY LANGUAGE SHOWING AN END
TO RESERVATION STATUS, NOT JUST A
PROVISION FOR GOVERNMENT SALES OF
UNALLOTTED, INDIAN-OWNED LAND

According to Respondent, the combination of allotments and public sales of unallotted land shows a Congressional intent to terminate an Indian reservation. (Respondent's Brief at 3-5.) California considers specific language of termination unnecessary. (Respondent's Brief at 20.)

The law is to the contrary.

A. Allotment Creates No Presumption Of Termination.

Congress did not regard allotment as extinguishing an Indian reservation in 1892 and does not today.

"The purpose of the allotment system was to protect the Indians' interest and to prepare the Indians to take their place as independent, qualified members of the modern body politic."

(Squire v. Capoeman, 351 U.S. 1, 9 (1955), quoting Board of County Commissioners of Creek County v. Seber, 318 U.S. 705, 715 (1943); see also Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968).)

Allotment was only one step toward ultimately "assimilating the Indians through dissolution of tribal governments and the compulsory individualization of

Indian land." (Seber, supra, at 716.) Trust allotments were to be a "period of transition." (Ibid.)¹ "The [general allotment] act of 1887..., clearly, does not...abolish the [allotted] reservations."²

1. The transition to assimilation has been suspended if not actually ended.

The trust period for allotments was originally 25 years. (25 U.S.C. §348.) It has been repeatedly extended pursuant to 25 U.S.C. §§348 and 391. It has even been reimposed when accidentally allowed to lapse. (25 U.S.C. §348a.)

The forced dissolution of tribal governments has also been abandoned. A California reservation cannot be terminated unless its Indians consent. (72 Stat. 619, as amended by 78 Stat. 390.) The pro-termination views expressed in H.Con.Res. 108 (83d Cong., 1st Sess. 1953) were only the views of that Congress. Being a concurrent resolution H.Con.Res. 108 died with the Congress that passed it, as was acknowledged by Secretary of the Interior Stuart Udall in a letter of April 15, 1961, to Richard Schifter, General Counsel, Association on American Indian Affairs. (A copy of that letter is Appendix A to this reply brief.) President Nixon repudiated termination in his Message To Congress On Indian Affairs of July 8, 1970. (6 Weekly Compilation of Presidential Documents 894, 895-896 (July 13, 1970).) See also 25 U.S.C. §§476, 477.

2. The Act of June 17, 1892, specified that allotments on the lower twenty miles of the Hoopa Extension were to be made in accordance with the general allotment act of 1887.

(United States v. Celestine, 215 U.S. 278, 287 (1909).)

Congress reaffirmed Celestine's view of allotment in 18 U.S.C. §1151. Section 1151 specifies that Indian country includes "all land within the limits of any Indian reservation...not withstanding the issuance of any patent."

B. Government sales of Unallotted Indian-Owned Land Create No Presumption Of Termination.

Seymour v. Superintendent, 368 U.S. 351 (1962), recognizes no inconsistency between a reservation's existence and a statute directing the United States, acting as trustee for that reservation's Indians, to sell "surplus" reservation land to non-Indian homesteaders. Indeed Seymour ruled, on the basis of 18 U.S.C. §1151(a), that Congress anticipates non-Indian ownership of land within reservations. (Id. at 358.)

California nevertheless argues that non-Indian homesteading "strongly militates against a continuation of...reservation status." (Respondent's Brief at

3.) The contention is premised on a statement in United States v. Celestine, 215 U.S. 278 at 285, that "reservation" describes an area "which Congress has reserved from sale."

Celestine was just describing how a reservation is created. The next sentence states:

"When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."

Celestine thus creates no presumption contrary to 18 U.S.C. §1151(a) and the holdings of Seymour, supra.

C. Termination Requires Specific Statutory Language Showing An End To Reservation Status.

A clear expression of Congressional intent is necessary to remove land from an Indian reservation. (United States v. Celestine, supra, 215 U.S. 278, 290-291; cf. Squire v. Capoeman, supra, 351 U.S. 1, 6-7; Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Choate v. Trapp, 224 U.S. 665, 675 (1912).)

Respondent claims to find a different viewpoint in Seymour's treatment of the 1892 Colville Act (Respondent's Brief at 20), but Respondent's position is inexplicable. The 1892 Colville Act contained language of clear intent. The statute said:

"All the following described tract or portion of said Colville Reservation...be, and is hereby, vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians... ."

Seymour used this language to show that the statute extinguished the North Half of the Colville Reservation. (368 U.S. 351 at 354-355.)

Respondent also relies on four lower court cases to support his contention that clear language is not required to end reservation status: United States v. LaPlant, 200 Fed. 92 (S.D. 1911); Toois-gah v. United States, 186 F.2d 93 (10th Cir. 1950); DeMarrias v. South Dakota, 206 F.Supp. 549 (S.D. 1962), aff'd 319 F.2d 845 (8th Cir. 1963); and Ellis v.

Page, 351 F.2d 250 (10th Cir. 1965). Respondent's reliance on these cases is misplaced, however.

Ellis v. Page, supra, for example, involved an agreement between the Government and the Indians which provided that the tribes occupying the reservation would

"cede, convey, transfer, relinquish [sic], and surrender, forever and absolutely, without any reservation whatsoever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced [within the reservation.]"

The court described those words as "unequivocal" (351 F.2d 250 at 252) and said

"In treaty parlance they are as appropriate to disestablish the reservations as the Congressional words 'vacate and restore' employed in the 1892 Act to disestablish a part of the Colville Reservation."

In other words, the Tenth Circuit based its decision on what it considered language showing a clear intent to terminate.³

3. Whether the language was actually as clear [footnote continued on next page]

Tooisgah, supra, and DeMarrias, supra, were based on agreements that are indistinguishable from the one considered in Ellis.

The approach adopted by the Ellis court is exactly what Petitioner believes is required here. To terminate a reservation a statute must use a phrase such as "vacated and restored to the public domain" (Act of July 1, 1892, 27 Stat. 62), "shall not be retained for purposes of Indian reservations" (Act of April 8, 1864, 13 Stat. 29), or "reservation is hereby discontinued" (Act of July 27, 1868, 15 Stat. 221). United States v. Celestine, supra, 215 U.S. 278, 290-291, requires nothing less.

Finally, United States v. LaPlant, supra, is of no help to Respondent, as it was disapproved in Putnam v. United States, 248 F.2d 292, 295 (8th Cir. 1957), and overruled sub silentio in United States ex rel Condon v. Erickson, supra, 344 F. Supp. 777.

as the court believed is not free from substantial doubt. (See Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001 (Minn. 1971); United States ex rel Condon v. Erickson, 334 F.Supp. 777 (S.D. 1972); cf. Ash Sheep Co. v. United States, 252 U.S. 159, 163-166 (1920); United States v. Brindle, 110 U.S. 688, 690-693 (1884).)

II

THE 1892 HOOPA EXTENSION ACT CLOSELY RESEMBLES THE 1906 STATUTE WHICH SEYMOUR HELD HAD NO EFFECT ON THE RESERVATION STATUS OF THE COLVILLE RESERVATION'S SOUTH HALF. THE 1892 HOOPA EXTENSION ACT IS SIGNIFICANTLY DIFFERENT FROM THE 1892 LAW WHICH SEYMOUR HELD HAD DISCONTINUED THE NORTH HALF OF THE COLVILLE RESERVATION

A. The 1892 Hoopa Extension Act Did Not Restore Lands To the Public Domain, Because, Unlike The 1892 Colville Act, The Hoopa Extension Law Contained No Express Language To That Effect While, Like The 1906 Colville Act, The Hoopa Extension Statute Made The Affected Indians Exclusive Beneficiaries Of Land Sale Proceeds.

The primary ground for the decision in Seymour v. Superintendent, supra, 368 U.S. 351, was that the 1892 Colville Act expressly "vacated and restored to the public domain" the North Half of the Colville Reservation whereas the 1906 Colville Act contained no such language concerning the South Half. Section I of this brief explains why United States v. Celestine, supra, 215 U.S. 278, required such express language to terminate Colville's North Half.

Despite Celestine and although the 1892 Hoopa Extension Act contains no phrase vacating or restoring unallotted lands to the public domain, Respondent contends that the 1892 Hoopa Extension Act and the 1892 Colville Act had the same "effect." The reason, argues Respondent at page 16 of his brief, is that under the 1892 Colville Act homesteaders could become private owners of unallotted lands under the general land laws of the United States. But, the 1906 Colville Act (which Seymour held did not restore land to the public domain) also authorized homesteaders to become private owners of unallotted land under the general land laws.

In addition, the 1892 Hoopa Extension Act required the United States to use any land sale proceeds solely for the affected Indians' benefit. That arrangement is, to quote Respondent, "essentially similar" to the 1906 Colville Act provision that sales proceeds would be deposited in the Treasury to the Colville Indians' credit. The 1892 Hoopa Extension arrangement is distinctly different, however, from the 1892 Colville Act which provided that proceeds from the sale of unallotted land were available "for

such...public use as Congress may make."⁴

Respondent believes that little significance should attach to who receives the land sale proceeds (Respondent's Brief at 17-18); but this Court thought otherwise in Seymour v. Superintendent, supra, 368 U.S. 351, at 355-356. Seymour held that under the 1906 Colville Act the Government was selling land and retaining proceeds only as the Indians' trustee. Under the 1892 Colville Act, the United States was selling land for its own account and the proceeds belonged to the Government. In other words, under the 1892 Colville Act the Government was selling public domain, and under the 1906 Colville Act the United States was selling Indian land.

Therefore, as the provisions for the disposition of proceeds in the 1892 Hoopa Extension Act and the 1906 Colville Act are "essentially similar," the effect of the 1892 Hoopa Extension Act was to authorize a sale of Indian lands. The effect was not the same as if that law

4. The 1892 Colville Act also allowed the Interior Department to expend the proceeds for the Indians' needs until Congress acted.

had expressly vacated unallotted lands and expressly restored them to the public domain.⁵

B. The 1906 Colville Act And The 1892 Hoopa Extension Act Do Not Have Different Meanings Just Because Of Somewhat Different Verbiage.

Unable to find words of express termination in the 1892 Hoopa Extension Act, Respondent's Brief points (at pages 4, 14-15) to a collection of gossamer distinctions between the phraseology of the 1892 Hoopa Extension Act and the 1906 Colville Reservation Act.

For example, the 1906 Colville Act authorizes homesteading of "unallotted" or "surplus" lands. The 1892 Hoopa Extension Act, on the other hand, authorizes homesteading of "all lands" except those which are allotted or reserved for Indian vil-

5. The Respondent seeks to bolster his position with a statement from a brief which the United States filed in another proceeding. (Respondent's Brief at 16-17.) While the weight to be accorded such a statement is dubious, the Court is undoubtedly aware that the United States no longer holds that position. (See the Memorandum For the United States As Amicus Curiae, filed in this proceeding.)

pages. Obviously, this minor language difference is of no significance. The Standing Rock Reservation Act of February 14, 1913 (37 Stat. 675) is, in this regard, indistinguishable from the 1892 Hoopa Extension Act, yet the South Dakota Supreme Court had no difficulty equating the 1913 Standing Rock Act with the 1906 Colville Act. (State v. Molash, 199 N.W. 2d 59 (1972).)

Similarly unmeritorious is Respondent's effort (at page 4 of his brief) to claim that the 1892 Hoopa Extension Act was abolishing a big reservation and creating many new smaller reservations by "reserving" land for allotments and villages. The word "reserve" was used as in common parlance, not to create new reservations. Public domain allotments-- which is what Respondent claims the 1892 Hoopa Extension Act provided for--are not reservations. (Compare 18 U.S.C. §1151(a) with 18 U.S.C. §1151(c).) Respondent's interpretation of "reserve" is also impossible to reconcile with Seymour's interpretation of the 1906 Colville Act. Section 7 of that law "reserved" lands for communal purposes.

Respondent's Brief also points out (at pages 2, 14-15) that the 1906 Colville Act described its affected area as "diminished Colville Reservation," while the 1892 Hoopa Extension Act describes its affected area not as "reservation" but as "lands embraced in what was [the] Klamath River Reservation." Several reasons for the Hoopa Act's description are possible. (See Petitioner's Opening Brief at 14-16.) Those reasons do not, however, include the abolition of the Klamath River Reservation by the 1892 statute, for the Klamath River Reservation had ceased to exist no later than 1876. (Petitioner's Opening Brief at 12-14.) However, the lands of the former Klamath River Reservation were added to the Hoopa Valley Reservation in 1891 (Petitioner's Opening Brief at 8, 14); and thus, the phrase "lands embraced in what was [the] Klamath River Reservation" was a convenient way of indicating which part of the Hoopa Square and Extension non-Indian settlers could homestead. By contrast, all of the "remaining Colville Reservation" was opened to settlement by the 1906 Colville Act.

In summary, it is hardly surprising

that a statute enacted in 1892 does not read exactly like one enacted in 1906. What is significant is that the 1892 Colville Reservation Act expressly vacated and restored the North Half of that reservation to the public domain, while the 1892 Hoopa Extension Act, adopted only two weeks earlier, contains no such language.

III

CONGRESS DID NOT CONSIDER THE LOWER TWENTY MILES OF THE HOOPA EXTENSION DE FACTO TERMINATED PRIOR TO THE ACT OF JUNE 17, 1892, NOR DID CONGRESS INTEND THAT LAW TO CAUSE A DE JURE TERMINATION

Respondent's brief attempts to show (at pages 2, 5-9) that "Congress did not regard the area [i.e., the lower twenty miles of the Hoopa Extension] as a de facto reservation prior to the act" of June 17, 1892. From that premise respondent argues that "Congress approved the bill apparently because it did not expect these lands to continue as a reservation." Both the premise and the conclusion are erroneous.

A. The Legislative History Of The Act of June 17, 1892 Does Not Show That Congress Regarded The Affected Area As De Facto Terminated Before The 1892 Statute.

Respondent's premise rests upon a misreading of the House Committee report and remarks in the House and Senate. The "abandoned" reservation referred to in Respondent's excerpted version of the House Report is the old Klamath River Reservation, not the Hoopa Extension. This can be ascertained by reading the entire report. Representative Geary's "abandoned" reservation must also be the Klamath River Reservation, since he says it was abandoned in 1861--thirty years before the Hoopa Extension was created. Abandonment of the Klamath River Reservation does not show that the 1891 Hoopa Extension was abandoned in early 1892.

Senator Fulton did argue: "It is not practically an Indian reservation. It never has been used for that purpose." (23 Cong. Rec. 3919.) And the House report and Congressman Geary made a few similar statements.

Congress' actions⁶ belie those statements, however, and make Senator Fulton and his allies appear only overeager sup-

6. See also the remarks of Senator Cockrell (23 Cong. Rec. 3918-3919 (May 4, 1892)) and of Senator Pettigrew, who, unlike Senator Fulton, was on the bill's conference committee (23 Cong. Rec. 4245 (May 13, 1892)).

porters of non-Indian settlers. The Senate and later the whole Congress rejected the House passed bill which would have authorized removal of Indians from the lower twenty miles of the Extension. (Compare 23 Con.Rec. 1599 with 23 Cong.Rec. 3918.) In place of the House bill, Congress substituted the present law which gave Indian residents of the lower twenty a preferential right to allotments, provided for the preservation of Indian villages and settlements, and directed the Secretary of the Interior to apply any land sale proceeds towards the Indians' education and maintenance.

The real purpose behind the Act of June 17, 1892, was--as explained in Petitioner's Opening Brief--to sell for the Indians' benefit those parcels which were surplus to the Indians' needs and those parcels which non-Indians had settled in good faith. The carrying out of that intent was not at all inconsistent with continued reservation status for the area. Contrary to Respondent's unsupported and inaccurate statements on the matter,⁷ the 1892 Act did not

⁷. Respondent's Brief asserts (at pages 9 [footnote continued on next page])

wipe out traditional Indian life on the lower twenty miles of the Extension. Instead, Indians were allotted nearly 40

and 12) that after the 1892 act "many of the Indians left this area," "were relocated," and "the Klamath River tribe became widely scattered." Respondent also says (at page 10) that "the practical effect of the 1892 act was to bring to a halt any federal supervision of most of the lands...[and to discontinue] traditional reservation functions in the lower area."

None of those supposed facts are supported by the record in this case. Some, such as the asserted end to federal supervision, are supported by no authority whatsoever and are contradicted by a Superintendent of the Hoopa Indian Agency in testimony before Congress (A.14). Other statements are rested on a meaningless bit of dicta in Elser v. Gill Net Number One, 246 Cal.App. 2d 30, 34 (1966).

Still other of Respondent's assertions are taken from an Interior Department decision (65 I.D. 59 (1958)), which is exceedingly hostile to the Yurok (or lower Klamath River) Tribe. The May 22, 1972 commissioner's report in Jessie Short v. United States, Ct.Cl. No. 102-63, describes that Interior Department decision as full of errors. (Id. at 103.) The commissioner's thoroughly considered and unbiased findings completely contradict the Interior Department decision. (See text, infra, and footnotes 8 and 9.)

Furthermore, the relocation conjured up by Respondent would be inconsistent with Congress' decision deleting "removal" authority from the Act of June 17, 1892.

percent of the land and also settled in eight villages.⁸ In 1932 the Bureau of Indian Affairs showed more Indians living on the lower twenty than on either the Hoopa Square or the rest of the Extension;⁹ and the Bureau considered the Indians living on all three parts of the reservation as being under its jurisdiction.¹⁰ Those facts are scarcely consistent with de facto termination.

B. The Legislative History Does Not Show The Required Clear Congressional Intent To De Jure Terminate The Lower Twenty Miles of The Extension.

8. The Commissioner's May 22, 1972, report in Jessie Short v. United States, supra, Ct.Cl. No. 102-63, found that 161 Indian allottees received 9,762 acres of allotments in 1892 on the lower twenty miles of the Extension. (Id. at 57.) The 9,762 acres would be nearly 40 percent of the lower twenty's 25,000 acres. The 161 allottees may not have included minor children and certainly did not include Indians living in villages (Id. at 111).

9. The comparison is based on a BIA census. The census is quoted at page 62 of the commissioner's report in Jessie Short v. United States, supra. The exact numbers were 608 Indians on the lower twenty as against 373 on the rest on the Extension and 561 on the Hoopa Square.

10. Single Appendix at 14.

Even if Congress considered the lower twenty miles of the Extension de facto terminated before the 1892 law, the area would have remained a de jure reservation under the Executive Order of October 16, 1891, until either the President or Congress affirmatively changed that status. The legislative history does not reflect the clear intent which United States v. Celestine, supra, 215 U.S. 278, 290-291, requires to effect such a change.

Respondent points to the phrase "lands embraced in what was [the] Klamath River Reservation" as showing the intent to terminate. (Respondent's Brief at 8.) That language is patently irrelevant, however, because Congress knew that the Klamath River Reservation had already been de jure dead for a long time. (H.Rpt.No. 161, 52d Cong., 1st Sess.)

Rather than showing a clear intent to terminate the lower twenty miles of the Hoopa Extension, the legislative history shows that Congress did not once mention the Extension and probably did not know of its existence. (See Petitioner's Opening Brief at 18.) Under such circumstances, Congress could hardly have intended to de jure terminate the area. (Cf. Menominee Tribe of Indians v. United States,

IV

THE RELEVANT AND AUTHORITATIVE MAPS
SUPPORT RESERVATION STATUS FOR THE
LOWER TWENTY MILES OF THE HOOPA EXTENSION

Petitioner's Opening Brief referred (at page 24) to a map in the 1892 Report of the Commissioner of Indian Affairs. The map showed both the lower and upper Hoopa Extension as reservation areas. Respondent points out that this map was probably prepared before June 17, 1892, because the map shows the Colville Reservation's North Half, which was discontinued by the Act of July 1, 1892.

By 1897, however, BIA mapmakers had caught up with Congress. The 1897 Commissioner's Report shows only an outline of Colville's North Half; the South Half is colored in accordance with the map's key. (Report of the Commissioner of Indian Affairs in Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1897.) In the 1898 report not even an outline of the North Half is left. (Report of the Commissioner of Indian Affairs in Annual Reports of the Department of the Interior

for the Fiscal Year Ended June 30, 1898.) In both the 1897 and 1898 maps the lower twenty miles along the Klamath continue to show as a reservation area.

Respondent's position is not strengthened by President Roosevelt's 1909 Proclamation placing parts of the Hoopa Valley Reservation into the Trinity National Forest unless allotted or reserved by the Interior Department. (The proclamation is Appendix A to Respondent's Brief.) First, the proclamation states that the lands shown on its maps "constitute a part [not all] of the Hoopa Valley Indian Reservation." Second, a diagonal line in the proclamation's maps has no bearing on this case. Although Respondent describes that line as the Extension's northern boundary, the line does not correspond to what the other maps in Respondent's own brief show as the northern end of the reservation. Those other maps all show the Extension extending into Town 12 North of Range 2 East, while the diagonal line only extends into Town 11 North. Even the smaller of the proclamation's two maps (labeled part 2 of the diagram) shows the reservation as extending past the diagonal line. The line to which Respondent attaches so much sig-

nificance appears to be nothing more than the northern limit on isolated national forest tracts within the reservation. (See the map labeled part 2 of the diagram.) Finally, the 1909 Proclamation is not contemporaneous with 1892.

The other maps on which Respondent relies (Appendices B, C, and D to Respondent's Brief) were not prepared by the Bureau of Indian Affairs--the federal agency charged with managing Indian Affairs--and are in conflict with the BIA's 1897 and current maps. Respondent's maps also conflict with the National Atlas' map of federal lands (Sheet 272). Respondent admits as much (at page 24 of his brief) and urges this Court to disregard the current BIA map and the National Atlas because they were published after this lawsuit began. The Interior Department is not a party to this lawsuit, however, so no cartographic boot-strapping is involved. In any event, Sheet 272 of the National Atlas shows that it was compiled in 1968, more than one year prior to the confiscation of Petitioner's fishing nets.

**JESSIE SHORT v. UNITED STATES PRO-
VIDES A SIGNIFICANT INTERPRETATION
OF THE ACT OF JUNE 17, 1892**

The May 22, 1972, report of the commissioner in Jessie Short v. United States Ct.Cl. 102-63, holds:

"[T]he act of 1892...and the more recent legislative and executive postscript dealings with the 'Klamath River Reservation'...were not intended or understood by their draftsmen and makers to have any bearing on the rights of the residents of the Hoopa Valley Reservation as extended by the 1891 executive order." (Emphasis added.)

(Id. at 108-109.)

The report then concludes that Indian villages on the lower twenty miles of the Extension are on the Hoopa Valley Reservation. (Id. at 111.)

The commissioner's rulings are not merely assumptions, as Respondent would have this Court believe. (Respondent's Brief at 21.) The commissioner's report is a comprehensive 117 page study of the

legal status of the Hoopa Reservation and its Extension. Just the relationship between the 1891 Executive Order and the 1892 Act takes 22 pages (34-52, 106-109). The Commissioner's report cannot be ignored in this proceeding.

VI

THE ACT OF MAY 19, 1958, AFFIRMS THE EXISTENCE OF A RESERVATION ON THE LOWER TWENTY MILES OF THE HOOPA EXTENSION

Petitioner's Opening Brief pointed out (at page 18-19) that the Act of May 19, 1958 (72 Stat. 121) restored to tribal ownership land "on" the "existing" Klamath River Reservation, i.e. the lower twenty miles of the Hoopa Extension. Respondent notes that the statute also "added" the land to the reservation. (Respondent's Brief at 18-19.) Thus, as respondent points out the law is not internally consistent.¹¹

11. Respondent also claims that the 1958 act is inconsistent with the 1953 grant of state jurisdiction over Indian country in 18 U.S.C. §1162. If the lower twenty miles of the Hoopa Extension were not terminated in 1892, however, the area was Indian country in 1953; and if the Indians had federally recognized fishing rights on the lower twenty, 18 U.S.C. §1162 gave the state no jurisdiction over Indian [footnote continued on next page]

should be ignored, however. Ambiguous laws are to be construed in the Indians' favor. (Squire v. Capoeman, supra, 351 U.S. 1, 6-7; Alaska Pacific Fisheries v. United States, supra, 248 U.S. 78, 89 (1918); Choate v. Trapp, supra, 224 U.S. 665, 675 (1912).)

VII

INDIAN CONTROL OF FISHING ON THE LOWER TWENTY MILES OF THE HOOPA EXTENSION WILL NOT JEOPARDIZE THE KLAMATH RIVER FISHERY

The effect of gill nets on the Klamath River fishery is legally irrelevant in this case. If treaties, statutes, regulations, or agreements afford Yuroks fishing rights on the lower twenty miles of the Hoopa Extension,¹² then Yurok fishing there (see Petitioner's Opening Brief at page 5, fn.1). The 1958 act would change nothing by recognizing the continuing existence of the reservation.

12. Whether Yurok Indians have fishing rights on the lower twenty miles of the Extension is not an issue in this proceeding. (See Petitioner's Opening Brief at 5, fn.1.)

In particular, and contrary to Respondent's Brief (at 10), this case will not decide whether Indians have a right to hunt and fish on privately owned lands within the Extension. Petitioner has asserted no such right. He had no intent to go on private lands; the 1964 flood on the Klamath River simply [footnote continued on next page]

fishing in that area will be under federal and tribal control and will not be subject to state law. (Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962).)¹³

An absence of state control would not imperil the Klamath River fishery, however. Regulation would simply pass made it difficult for him to tell where his mother's allotment left off and Simpson Timber's land began. (A.33.) The case against Petitioner is based on gill-netting (A.5) not on trespass.

Petitioner is not even a plaintiff in Blake v. Arnett, No. C-72-2140 (N.D. Cal.), which seeks judicial recognition of two Yurok Indians' right to cross private land in order to exercise fishing rights in the Klamath River. In any event, Respondent's Brief is open to serious question when it says (at page 11) that the Blake plaintiff's contention is inconsistent with a Congressional intent to give Hoopa Extension homesteaders the same land rights as homesteaders of non-Indian lands. (See California Constitution, Art. I, §25 and Art. XV, §2; Gion v. City of Santa Cruz, 2 Cal. 3d 29 (1970); Confederated Salish and Kootenai Tribes v. Vuller, 437 F.2d 177 (1971).)

13. Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) suggests no different result. Puyallup upheld state regulation for conservation purposes only of off-reservation Indian fishing.

from one authority (California) to two others (the United States and the reservation government).

Of course, the new authorities might adopt different regulations than the old one has. Indian gill netting might be officially sanctioned. After all, Yuroks have always fished the lower Klamath River with dip nets,¹⁴ gill nets,¹⁵ and seines (A.37, 39-40); and fish is a staple of the Yurok diet (A.34).¹⁶ On

14. The traditional Yurok dip nets were very substantial affairs, not the hand held nets which Yuroks may use under California Fish and Game Code §7155. (A.37.) Section 7155 is no substitute for Indian control of fishing on the lower twenty miles of the Hoopa Extension.

15. Respondent's Brief at 27 states, "Undisputed evidence at the trial shows that the use of gill nets...are [sic] particularly harmful to salmon." That statement is incorrect. The trial judge refused to hear any evidence on the effects of gill nets. (A.27-28.) He ruled that such evidence would be irrelevant. (A.27-28.)

The judge did take judicial notice that gill nets are particularly harmful to salmon. Petitioner agrees that gill nets kill fish; but fish thrived in the the Klamath River when only Indians fished there, and it is undisputed that the Yuroks fished with gill nets (see footnote 16 and the accompanying text).

16. Respondent admitted all the facts in this sentence by adopting the statement [footnote continued on next page]

the other hand, non-Indian fishing might be banned altogether (see 18 U.S.C. §1165); for as the trial judge said, "[M]an is very harmful to salmon, particularly the white man."

Indians maintained the Klamath River fishery before the white man came on the scene; and working with the federal government, the Indians could and would do so once again. The state is not the only agency capable of conserving the lower Klamath River fishery.

CONCLUSION

The Act of June 17, 1892, did not terminate the lower twenty miles of the Hoopa Extension. This court should reverse the judgment below and remand for further proceedings consistent with the reservation status of the land where Raymond Mattz's nets were seized.

Dated: March 9, 1973

Respectfully submitted,

LEE J. SCLAR
BRUCE R. GREENE

of the case in Petitioner's Opening Brief.
(Respondent's Brief at 1.)

ROBERT J. DONOVAN
WILLIAM P. LAMB
CALIFORNIA INDIAN
LEGAL SERVICES

By: _____
Lee J. Sclar



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

APR 15 1961

Dear Dick:

Thank you very much for your letter of March 8, setting forth the Association on American Indian Affairs' analysis of the present status of H. Con. Res. 108.

I most certainly agree that resolution, whatever it meant, died with the 83rd Congress and is of no legal effect at the present time. It is my belief that further discussion of it is futile and that we should be devoting ourselves instead to the opportunity we now have to develop programs with the Indians which will help them improve their lives.

Sincerely yours,

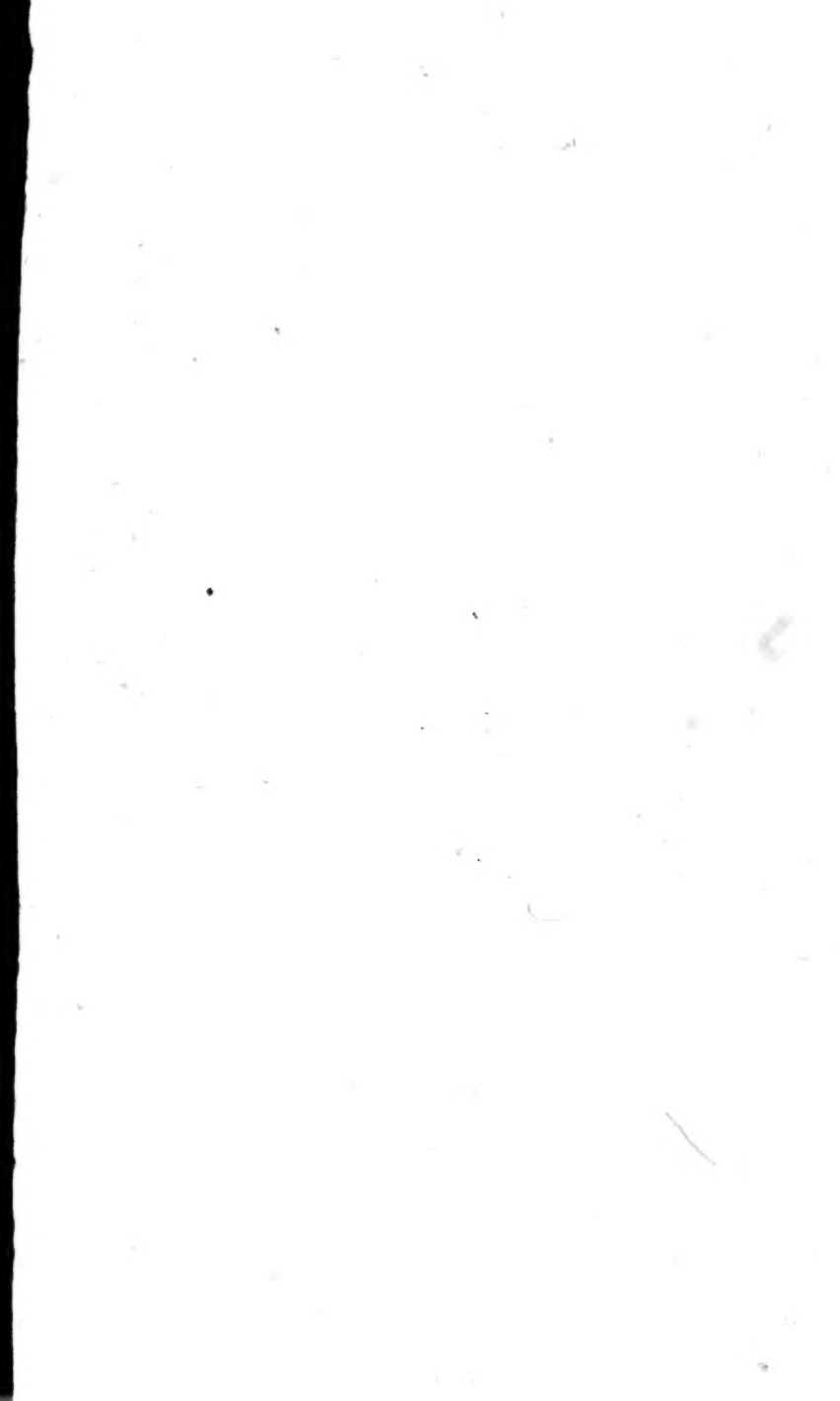

Secretary of the Interior

Mr. Richard Schifter
Office of General Counsel
Association on American Indian
Affairs, Inc.
1700 K Street, N. W.
Washington 6, D. C.

APPENDIX A

ERRATUM IN PETITIONER'S OPENING BRIEF

The quote from Jessie Short v. United States on page 15 of Petitioner's Opening Brief is from page 108 of the May 22, 1972, report of the Court of Claims Commissioner.



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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1182

RAYMOND MATTZ, PETITIONER

v.

G. RAYMOND ARNETT

*ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF
APPEAL, FIRST DISTRICT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The order of the Supreme Court of California denying petitioner's application for review (Pet. App. C) was entered on December 16, 1971. The opinion of the Court of Appeal, First District (Pet. App. A), is reported at 20 Cal. App. 3d 729, 97 Cal. Rptr. 894.

JURISDICTION

On December 16, 1971, the Supreme Court of California denied petitioner's application for review. A petition for a writ of certiorari was filed with this Court on March 14, 1972, and was granted on January 15, 1973. This Court's jurisdiction rests on 28 U.S.C. 1257(3).

EXECUTIVE ORDER AND STATUTES INVOLVED

The Executive Order of October 16, 1891, I Kappler, *Laws and Treaties* 815 (1904), reads as follows:

EXECUTIVE MANSION, *October 16, 1891.*

It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.

BENJ. HARRISON.

The Act of June 17, 1892, 27 Stat. 52, reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands:

Provided, That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: ***Provided***, That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law

shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first in order of time: *Provided*, That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: *And provided further*, That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further*, That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Approved, June 17, 1892. [Bold type shows language added by Senate amendment of House bill.]

18 U.S.C. 1151 reads as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of

any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. 1162 provides in relevant part:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

<i>State or Territory of</i>	<i>Indian country affected</i>
* *	* *
California-----	All Indian country within the State.
* *	* *

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; * * * or shall deprive any Indian or

any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

The California Fish and Game Code, Section 12300, reads as follows:

Irrespective of any other provisions of law, the provisions of this code are not applicable to California Indians whose names are inscribed upon the tribal rolls, while on the reservation of such tribe and under those circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States.

QUESTION PRESENTED

Whether petitioner's fishing nets were seized by the State of California within Indian country as defined by 18 U.S.C. 1151 (62 Stat. 757, as amended by 63 Stat. 94).¹

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's of October 10, 1972, inviting the Solicitor General to express the views of the United States in this case.

STATEMENT

This action was brought by the respondent, director of the state Department of Fish and Game, for the

¹ Having ruled that the land where the nets were seized was not Indian country, the California courts did not reach the issue whether, if the land is Indian country, petitioner is a beneficiary of rights which either are preserved from state regulation by 18 U.S.C. 1162(b), *supra*, or entitle him to the exemption of California Fish and Game Code, Section 12300, *supra*. See Pet. App. A, pp. 1-2.

forfeiture of five nylon gill nets owned by the petitioner, on the ground that he used the nets in violation of California's fish and game laws. The nets were seized by a state game warden on September 24, 1969. The nets were stored in open containers upon land owned by a lumber company within 200 feet of the Klamath River on land that had once been part of the Klamath River Reservation and that had been made part of the Hoopa Valley Reservation by Executive Order in 1891 (Pet. App. A, p. 1; Pet. App. B, pp. 4-5).

The petitioner intervened to resist the forfeiture, alleging that he is an enrolled Indian of the Yurok (Klamath River) Tribe, that the nets were seized within Indian country as defined by 18 U.S.C. 1151, and that the California law prohibiting use of the nets was therefore inapplicable.

The trial court held that the land where the nets were seized was not "Indian country" within the scope of 18 U.S.C. 1151 and was not within an Indian reservation within the meaning of California Fish and Game Code, Section 12300, because the Act of June 17, 1892, which had opened the Reservation for public purchase of excess land had, in effect, terminated the twenty miles of the reservation nearest to the Pacific Ocean (Pet. App. B, pp. 1-2). The state Court of Appeal affirmed the decision on the same grounds (Pet. App. A), and the Supreme Court of California denied petitioner's application for review (Pet. App. C). Petitioner then filed a petition for a writ of certiorari in this Court, which granted the petition on January 15, 1973.

SUMMARY OF ARGUMENT

I. The events leading to the Act of June 17, 1892, show that the Act did not terminate the portion of the Hoopa Valley Reservation to which it applied. The seaward twenty miles of the addition to the Hoopa Valley Reservation had been the Klamath River Reservation. Because of legal problems in maintaining multiple separate reservations, the President, by Executive Order in 1891, had made the Klamath River Reservation part of the Hoopa Valley Reservation. The reference in the 1892 act to "what was the Klamath River Reservation" merely designates the portion of the addition to the Hoopa Valley Reservation that had previously been a separate reservation. It does not indicate a congressional abolition of half of the just created Hoopa addition.

The Act of 1892 can properly be understood only in light of the General Allotment Act which Congress had recently passed. In that Act Congress maintained Indian reservations but permitted allotments of land within reservations to individual Indians and sales of surplus land to non-Indians. The General Allotment Act, however, did not require the President to make allotments within any particular reservation. Consequently a number of Acts requiring allotments and disposal of surplus land within particular reservations were passed. The 1892 Act was such an Act. Nothing in the Act purports to terminate the part of the reservation to which it applies. When Congress has wished to terminate all or part of a reservation it has done so explicitly.

II. The consistent course of administrative and congressional action subsequent to the Act of 1892 supports the proposition that that Act did not abolish the Klamath River portion of the Reservation. The Department of the Interior, shortly after the passage of the Act, was required to determine whether allotments made under the Act were allotments on or off a reservation. In a carefully reasoned and documented opinion the Department in charge of administering the Act ruled that the Act reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. This has been the consistent view of the Department of the Interior, and has also been the premise on which Congress has subsequently acted.

III. The decisions of this Court have consistently held that Acts opening reservations or parts of reservations for allotment and disposal of surplus land for the benefit of the resident Indians do not thereby abolish the reservations. *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, controlling here. The Act of 1906 in question in *Seymour*, 34 Stat. 80, was identical in effect to the Act in question here. This Court held that that statute, while requiring allotment and disposal of surplus land in the Colville Reservation, did not thereby terminate the Reservation. Moreover, although one of the primary purposes of the extension of the Hoopa Valley Reservation was to secure the Indians' fishing rights in the Klamath River, nothing in the 1892 Act purported to terminate those rights. An intent to take such rights without compensation merely by implication should not be presumed.

ARGUMENT

I. THE EVENTS LEADING TO THE ACT OF JUNE 17, 1892, 27 STAT. 52, AND THE ACT ITSELF SHOW THAT THE ACT DID NOT TERMINATE THE ADDITION TO THE HOOPA VALLEY RESERVATION CREATED BY EXECUTIVE ORDER ONLY MONTHS BEFORE, ON OCTOBER 16, 1891

A. THE HISTORY OF THE ESTABLISHMENT OF THE RESERVATION

The Yurok Indians historically have been fishing people who live on the lower Klamath River near the Pacific Ocean, the area in question here. See Kroeber, *Handbook of the Indians of California*, p. 1 (1925).² Their very name means "downstream" in the language of the adjacent Karok Tribe. Kroeber, *supra*, at p. 15.

On November 16, 1855, as authorized by the Act of March 3, 1855 (10 Stat. 686, 699), President Pierce set apart as an Indian reservation a strip of territory extending along the Klamath River for a width of one mile on each side for a distance of twenty miles inland from the Pacific Ocean. The area is a deep gorge, consisting of craggy timberland rich in redwood and pine with little arable land except at the river bank. The area was chosen because the Indians had always lived there and had depended largely on fish from the Klamath River for their diet and trade.³

² There are excerpts from Kroeber at A. 34-44.

³ See 1858 Annual Report of the Commissioner of Indian Affairs, p. 286, quoted in *Crichton v. Shelton*, 33 Decisions of the Department of the Interior (I.D.) 205, 216. See also 33 I.D. at 205-206.

In his 1861 Annual Report (quoted in 33 I.D. at 216) the Commissioner of Indian Affairs described the Reservation as follows:

This reservation is well located, and the improvements are suitable and of considerable value. There is an abundance of excellent timber for fencing and all other purposes, and at the mouth of the Klamath river there is a salmon fishery of great value to the Indians.

In 1861 the Klamath river flooded and destroyed many of the Indian villages. This led the Interior Department to attempt a temporary relocation of the Yurok and other Klamath River Indians to a reservation on the Smith River, but few left and most of those soon returned.⁴ The Smith River reservation was thereafter abolished.⁵

In 1864 the Hoopa Valley Reservation, a 12-mile square about 50 miles inland from the mouth of the Klamath River, was created by administrative order authorized by the Act of April 8, 1864 (13 Stat. 39) (later confirmed by Executive Order of June 23, 1876, I Kappler, *supra*, at p. 815). Its creation inadvertently cast doubt on the continued *legality* of the Klamath River reservation (not on its occupation or use by Indians). This was so because the Act of April 8, 1864, *supra*, which authorized the President to create new Indian reservations within California, limited the number of new and old reservations to four, and, arguably, the President had exceeded that number. Indeed, in 1889

⁴ See *Crichton, supra*, 33 I.D. at 208.

⁵ Act of July 27, 1868, 15 Stat 198, 221.

the Circuit Court for the Northern District of California ruled that because of the President's failure to list the Klamath River Reservation as one of the four, it was no longer legally a reservation. *United States v. Forty-Eight Pounds of Rising Star Tea*, 38 Fed. 400.

It was in response to this decision that, in order to preserve the Klamath River Reservation, President Harrison issued the Executive Order of October 16, 1891 (p. 2, *supra*) extending the Hoopa Valley Reservation to the sea in a strip one-mile wide on each side of the Klamath River so as to include the former Klamath River Reservation. In *Donnelly v. United States*, 228 U.S. 243, this Court upheld the validity of the 1891 Executive Order extending the Hoopa Reservation to the sea.*

B. THE ACT OF JUNE 17, 1892 AND THE GENERAL ALLOTMENT ACT

In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the General Allotment Act (Act of February 8, 1887, 24 Stat. 388) and (2) the changes made in the 1892 Act during the legislative process in order to incorporate Allotment Act provisions in it.

1. By the 1880's and 1890's the Indians in the West had given up vast areas of land, but they still had sub-

* *Donnelly* concerned a crime committed within the "connecting strip" joining the former Hoopa and Klamath River Reservations. The Court consequently did not specifically consider the effect of the Act of 1892. However, it characterized it as "opening" that part of the reservation to "settlement, entry and purchase," 228 U.S. at 253, not as terminating or abolishing it.

stantial holdings in the form of reservations, created by treaty, executive order, or statute. During this period there was much pressure on Congress to remove land from these reservations and make it available for settlement and exploitation by non-Indians. But there was also considerable feeling that to do so would violate treaties and generally break faith with the Indians who had been induced to give up larger areas of land and to become peaceful in return for federal protection and the reservations created for them. The General Allotment Act of 1887 was to some extent a congressional compromise of these conflicting pressures and considerations.

The policy of the Act was to continue the reservation system and the trust status of Indian land at least for the time being, but to allot individual tracts to Indians (in trust) which they would be encouraged to farm. When all the land had been allotted and the trusts had expired, the reservation could be abolished.⁷ In the meantime, since acreage limitations were put on the allotments, there would usually be surplus land within reservations which could be made available to non-Indians. It was hoped that the resulting juxtaposition of the two races would be edifying to the Indians and encourage them to adopt white ways.⁸

While the General Allotment Act thus permitted the President to make allotments of reservation lands and, with tribal consent, to sell surplus lands, it did not

⁷ The original trust period was to be 25 years, but those periods have often been extended. See p. 21, *infra*.

⁸ See, generally, United States Department of the Interior, Federal Indian Law, pp. 115-117, 127-129, 776-777 (1958).

require him to do so. Congress, therefore, occasionally enacted special legislation to assure that a particular reservation would be opened for allotment and non-Indian settlement. The Act of June 17, 1892, at issue in this case, is an example of such legislation.⁹

Because of the General Allotment Act and these special Acts opening land within reservations to settlement, it is common today to have extensive non-Indian holdings within reservations. As we show in point III, *infra*, however, allotments to Indians and sales to non-Indians, whether under the General Allotment Act or special Acts, do not in themselves terminate the reservations or even make the lands therein held by non-Indians cease to be Indian country. *Seymour v. Superintendent*, 368 U.S. 351, 357-359; *Ellis v. Page*, 351 F.2d 250 (C.A. 10); *State v. Molash*, 199 N.W. 2d 591 (Sup. Ct. S.D.).

2. The pressures of non-Indians to obtain some of the land and especially the redwood forests within the Klamath River Reservation were particularly strong. In 1879, at the request of the Department of the Interior, military forces were used to evict trespassers. Thereafter, the Secretary decided in 1883 to make allotments to Indians living on the reservation, but he revoked the decision because of inadequate surveys and nothing further was done at that time to make allotments or authorize white settlement.¹⁰ In October 1891,

⁹ The policy of allotment and sale of surplus lands within reservations was repudiated in the Indian Reorganization Act of 1934, 48 Stat. 984 *et seq.*, as amended, 25 U.S.C. 461 *et seq.*

¹⁰ See Annual Report of the Commissioner of Indian Affairs for 1885, quoted in part in *Crichton, supra*, 33 I.D. at 214.

the President reaffirmed the existence of the reservation by his Executive Order incorporating it into an extension of the Hoopa Valley Reservation (see p. 2, *supra*).

House Bill, H.R. 38, 52d Cong., 1st Sess., which after amendment became the Act of 1892 at issue here, was reported out of committee on February 5, 1892¹¹ and was passed by the House on March 1, 1892,¹² only months after the President had reaffirmed the existence of the reservation. The apparent purpose of the House Bill¹³ was to seek to open the reservation to non-Indian interests without raising too much opposition. Its language did not purport to terminate the Reservation (the Hoopa extension) just created by the President, and it did not purport to "diminish" the Reservation. Nor did it call for the removal of the Indians.

The bill first designates, as the area to which it applied, what was "Klamath River Reservation"—thus only the seaward portion of the just created extension of the Hoopa Valley Reservation. The bill opened the designated portion of the Reservation for settlement under the homestead, mineral and timber laws. However, it recognized that there were both Indian villages and settlements within that part of the reservation and authorized the Secretary of the Interior to set those apart for permanent use by the Indians. The

¹¹ H. Rept. No. 161, 52d Cong., 1st Sess.

¹² 23 Cong. Rec. 1598-1599.

¹³ At pages 2-3, *supra*, we have set forth the 1892 Act with the House language in normal type and the language added by the Senate in bold type.

bill provided for confirmation of title for non-Indians who had settled on reservation land not constituting Indian villages or communities, and specified that the funds derived from the sale of the land "shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children." The House bill thus recognized a continuing Indian community and a continuing federal responsibility for Indians living in this portion of the reservation.

The Senate, however, was not satisfied that the House bill adequately protected Indian interests; it amended the bill and called for a conference with the House. 23 Cong. Rec. 3918-3919. As a result of the Senate amendment, the first two provisos of the Act were added (see p. 3, *supra*, bold type). In these provisos the area in question is referred to as a "reservation" and "any Indian now located upon said reservation" is permitted to "apply to the Secretary of the Interior for an allotment of land for himself and * * * for the members of his family, under the provisions of * * * [the General Allotment Act]." In other words, the Senate, dissatisfied with the House bill, which would have allowed non-Indian settlement without first providing for Indian allotments, brought the Act into line with the General Allotment Act, with the difference that Congress ordered the opening rather than leaving it to the President with the consent of the Indians.¹⁴

¹⁴ Senator Dawes, the author of the General Allotment Act, sat on the Conference Committee. See 32 Cong. Rec. 3919. Be-

Nothing in the Act, or even in the House bill, purports to abolish the Reservation. The reference in the Act to "what was the Klamath River Reservation" merely identifies the part of the extension of the Hoopa Valley Reservation to which the Act applied (see p. 15, *supra*). The court below erred in relying on this descriptive designation as indicating abolition of the Reservation. When Congress has wished to abolish an Indian reservation, it has used direct and unambiguous language to accomplish that purpose. For example, when Congress abolished the nearby Smith River Reservation it stated: [T]he Smith River reservation is hereby discontinued." 15 Stat. 221. And when several Oklahoma Reservations were abolished, the tribes agreed to "cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation' all their claim in and to the lands embraced within the designated reservation." *Ellis v. Page*, 351 F. 2d 250, 252 (C.A. 10).

cause the House bill was significantly amended in the Senate and in the Conference Committee before it was enacted, respondent errs in relying (Br. pp. 5-7) on statements in the House Report accompanying that bill which do not reflect the amendments designed to protect the interests of Indians living on the Reservation. Those amendments are inconsistent with the statement in the House Report (and with isolated similar statements by individuals during the floor debates) that the Klamath River area was no longer being used as a reservation—a statement as to which the Department of the Interior later declared "the committee was apparently mistaken * * *" (*Crichton, supra*, 33 L.D. at 214). Moreover, although the House Report is dated more than 5 months after the Executive Order establishing the extension of the Hoopa Valley Reservation (see p. 15, *supra*), it makes no mention of this highly significant Presidential action affecting the land and people in question.

In another example, Congress specified:

[T]he reservation lines of the said Ponca and Otoe and Missouri Indian reservations be, and the same are hereby abolished. 33 Stat. 218.

See also 68 State. 250 (providing for the abolition of the Menominee Reservation): *State v. Molash*, 199 N.W. 2d, 591 (Sup. Ct. S.D.); *Leech Lake Band v. Herbst*, 334 F. Supp. 1001 (D. Minn.).

The contrast of these statutory provisions with the Act at issue here is highly significant—particularly in light of the 1892 Act's provisions recognizing that Indians individually and in villages and communities would continue to live in the area and would continue to be under federal protection (see p. 4, *supra*).¹⁵

And there is nothing in the Act suggesting any loss of fishing rights for the Indian residents of the area or diminution of federal jurisdiction over the area.

¹⁵ In 1893, pursuant to the 1892 Act and the General Allotment Act, 161 allotments were granted to Indians residing on the Klamath River part of the Hoopa Extension, thus demonstrating a sizeable Indian community at the time the Act was passed. These allotments averaged 60 acres each, totaling 9,762 acres, 40% of the approximately 25,000 acres of the part of the reservation opened for settlement. Finding of Fact No. 83, p. 57, Report of Commissioner in *Jessie Short, et al. v. United States*, C.Cls. No. 102-63. At the trial of the present case evidence was submitted showing that petitioner's mother holds such an allotment and that his fishing was in the close vicinity of that allotment (A. 28-31).

In *Jessie Short*, pending in the United States Court of Claims, the issue is whether the joining of the two reservations gave all Indians residing therein rights in the whole or whether each group has rights only within its original portion. Neither the United States nor the other parties to that suit contest the continued existence of the whole as an Indian reservation though the decision of the California court of appeal in this case is, of course, noted.

II. THE CONSISTENT COURSE OF ADMINISTRATIVE AND CONGRESSIONAL ACTION SUBSEQUENT TO THE ACT OF JUNE 17, 1892, SUPPORTS THE PROPOSITION THAT THE ACT DID NOT ABOLISH THE KLAMATH RIVER PORTION OF THE 1891 EXTENSION OF THE HOOPA VALLEY RESERVATION

Interpretation of a law by the government agency responsible to administer it is entitled to great weight. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434; *Udall v. Tallman*, 380 U.S. 1, 16. The consistent course of administrative interpretation by the Department of the Interior has been, and remains, that the Klamath River Reservation was not abolished by the 1892 Act and still survives.

In 1904 the Department of the Interior was required to rule on whether an allotment made in the Klamath River Reservation portion of the Hoopa Extension under the Act of June 17, 1892, was an allotment within an Indian reservation or outside a reservation. *Crichton v. Shelton*, 33 I.D. 205. The question of the survival of the Reservation after the 1892 Act was squarely presented. In a carefully reasoned and fully documented opinion, the Department ruled that the challenged allotments were allotments on a reservation, and that the 1892 Act, in authorizing such allotments, reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. 33 I.D. at 219-220. This contemporaneous interpretation of the 1892 Act was rendered, not by the Bureau of Indian Affairs, but by the Department of the Interior—the Department charged with administering the Act both as to Indians (through the Bureau of Indian Affairs),

and as to non-Indian settlers (through the Land Office).

The opinion is significant not only for its holding, but also for the thorough factual and historical background it set forth at a time when the events were less remote. Of particular importance here is the opinion's carefully documented statement that (33 I.D. at 217):

* * * the lands within this reservation are peculiarly adapted to the purposes for which it was set apart, reference being had to the location of said lands and the habits and necessities of the Indians [occupying them]. There is little question that the prevailing motive for setting apart the reservation was to secure to the Indians the fishing privileges of the Klamath River. * * *

Testimony at a congressional hearing held in 1932¹⁶ confirms that the Department of the Interior still considered the seaward twenty miles of the Klamath River to be an Indian reservation. O. M. Boggess, Superintendent (for 12 years) of the Department's Hoopa Indian Agency, in a statement taken at Hoopa California, September 24, 1932, testified (A. 14):

Mr. BOGGESS. This reservation is 12 miles square and then there is an extension 1 mile on each side for an additional 50 miles down the Klamath River to the east [sic] coast.

Senator FRAZIER. Is it all connected?

Mr. BOGGESS. Yes; and it is all classed by the Indian Office as one reservation.

¹⁶ 72d Congress, *Survey of Conditions of the Indians in the United States*, Part 29, California, U.S. Printing Office 1934. See A. 12-16.

Senator FRAZIER. What do they call this reservation?

Mr. BOGGESS. They call it the Hoopa, and the mile strips they call the Klamath.

The Department of the Interior today administers the entire 1891 extension to the Hoopa Valley Reservation as an Indian reservation. See note 15, *supra*.¹⁷

Moreover, after it authorized entry to surplus lands in the 1892 Act, Congress also continued to treat the Klamath River Reservation as an existing reservation. Indians had continued to live on this part of the Hoopa Extension (as they do today), but the trust period on their allotments had expired in 1919. Instead of considering its responsibilities terminated in this area, Congress in the Act of December 24, 1942, 56 Stat. 1081, 25 U.S.C. 348a, extended "The period of trust on lands allotted to Indians of the Klamath River Reservation * * *," reimposing "the trust on certain lands allotted to Indians of the Klamath River Reservation, California." And in the Act of May 19, 1958, 72 Stat. 121, Congress restored to tribal ownership 159.57 acres of "vacant and undisposed-of ceded lands * * * on the following named Indian reservations * * *: Klamath River, California * * *." Compare *Seymour v. Superintendent*, 368 U.S. 351, 356.

¹⁷ See, also, map of Indian Land Areas published by the Department of the Interior in 1971, which we have lodged with the Clerk of this Court.

III. THIS COURT'S DECISIONS INDICATE THAT THE FOREGOING CONSIDERATIONS ESTABLISH THE CONTINUED EXISTENCE OF THE RESERVATION

1. The Act of June 17, 1892, is only one of many Acts which between 1887 and approximately 1913 opened Indian reservations for allotments to individual Indians and settlement of surplus lands by non-Indians.¹⁸ These Acts are modifications of the General Allotment Act designed to apply to specific reservations. While they vary in detail, they rather uniformly provide for allotments to individual Indians within the reservation, make surplus land available to homesteaders, and provide that the proceeds from the disposition of the surplus lands will be used for the benefit of Indians on the reservation. The question whether such Acts make either land allotted to Indians or land patented to non-Indians no longer Indian country has been before the courts many times and has been addressed by Congress in defining Indian country in 18 U.S.C. 1151, pp. 4-5, *supra*. Both before and after the enactment of 18 U.S.C. 1151, this Court has consistently held that neither allotment nor sale of land within a reservation terminates the reservation.

¹⁸ See, e.g., Act of March 2, 1889, 25 Stat. 888 (Sioux Reservations), *United States v. Nice*, 241 U.S. 591; Act of March 22, 1906, 34 Stat. 80 (Colville Reservation), *Seymour v. Superintendent*, 368 U.S. 351; Act of May 29, 1908, 35 Stat. 460 (Cheyenne River Reservation), *United States ex rel. Condon v. Erickson*, 344 F. Supp. 777 (D. S.D.); Act of June 1, 1910, 36 Stat. 455 (Fort Berthold Reservation), *The City of New Town, North Dakota v. United States*, 454 F. 2d 121 (C.A. 8); Act of February 14, 1913, 37 Stat. 675 (Standing Rock Reservation), *State v. Molash*, 199 N.W. 2d 591 (Sup. Ct. S.D.).

In *United States v. Celestine*, 215 U.S. 278, the Court had to decide whether various patents of land made within a reservation precluded federal jurisdiction over a murder that might have occurred on patented land. The Court held (*id.* at 284):

That the offense was committed within the limits of the Tulalip Indian Reservation is distinctly charged in the indictment and not challenged in the plea in bar. Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also patented, both tracts remained within the reservation until Congress excluded them therefrom.

The general principle stated by the Court was that " * * * when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Id.* at 285. The Court held that the patenting of allotments on the reservation to individual Indians did not constitute such separation and did not terminate the reservation.

Several years later in *United States v. Nice*, 241 U.S. 591, the Court was called upon to interpret the Act of March 2, 1889, 25 Stat. 888, which, similarly to the Act at issue here, required allotments to be made within various Sioux reservations in accordance with the General Allotment Act and which authorized the Secretary of the Interior, with the consent of the tribe, to sell surplus land after the allotments had been made. The Court held that this Act did not terminate the reservation, since both the General Allotment Act

and the Act in question "disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relations of Indians having allotments under the Act was recognized during the trust period as still continuing." 241 U.S. at 596-597. See also *Wilbur v. United States*, 281 U.S. 206.

This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, controlling here. The 1906 Act in question in *Seymour*, 34 Stat. 80, was identical in effect to the Act in question here. That Act (1) provided for allotments to Indians under the provisions of the General Allotment Act (Sec. 2); (2) required that surplus land be made available for homesteading (Sec. 3); (3) required that surplus land not settled by homestead be sold at auction (*ibid.*); and (4) provided that the proceeds received from homesteading and sale be used for the benefit of the Indians remaining on the reservation (Sec. 6). In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservation or "restoring that land to the public domain" (368 U.S. at 355) and the Act's requirement that the proceeds of sales of the land be used for the benefit of the Indians (*id.* at 355-356). The Court also relied on the subsequent interpretation of the Act by the Department of the Interior (*id.* at 357) and the subsequent congressional restoration to the tribe of undisposed of lands within the

reservation (*id.* at 356).¹⁹ All of these factors, which were controlling in *Seymour*, are also present, and equally controlling, here.

2. We note also that no mention is made in the Act of June 17, 1892, of depriving the Indians of the Hoopa Valley Reservation Extension of either their ownership of the river bed or their fishing rights.²⁰

In *Donnelly v. United States*, 228 U.S. 243, 259, this Court held that the river bed was part of that Reservation and emphasized the importance of fishing to Indian life as follows:

Does the reservation include the bed of the Klamath River? The descriptive words of the order are "a tract of country one mile in width on each side of the Klamath River and extending," etc. It seems to us clear that if the United States was the owner of the river bed,²¹

¹⁹ The Court in *Seymour* also rejected the State's alternative contention that the reservation, if not totally abolished, had at least been diminished to the extent of actual purchases of lands within it by non-Indians. The Court held this contention inconsistent with the definition of Indian country in 18 U.S.C. 1151 as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent * * *." 368 U.S. at 357-358.

²⁰ After extensive hearings in 1964 the Senate let die in committee two proposals to terminate Indian fishing rights on the West Coast, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, on S. J. Res. 170 and S. J. Res. 171, 88th Cong., 2d Sess. And Congress in 18 U.S.C. 1162(b) (p. 5, *supra*) in granting criminal and civil jurisdiction over Indian country to certain States specifically excepted federally protected fishing rights.

²¹ The Court held that it was. *Id.* at 264.

a reasonable construction of *this language requires that the river be considered as included within the reservation*. Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time to exclude the river. As *a matter of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing*. The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described as running in a narrow canyon through a broken country, the Indians as dwelling in small villages close to its banks. [Emphasis added.]

See also *Metlakatla Indians v. Egan*, 369 U.S. 45; *Choctaw Nation v. Oklahoma*, 397 U.S. 620.

The obvious intent of specifically including the riverbed and shore in the Hoopa Extension (Executive Order of October 16, 1891) was to protect the right of the Indians to fish. Nothing in the Act of 1892 purported to terminate the Tribe's ownership of the riverbed or their fishing rights. An intent to take such rights without compensation merely by implication should not be presumed. *Menominee Tribe v. United States*, 391 U.S. 404. See also *Kennerly v. District Court of Montana*, 400 U.S. 423.

CONCLUSION

The judgment of the California Court of Appeal should be reversed and the case should be remanded for determination of the issues not reached by the courts below.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

CARL STRASS,
GLEN R. GOODSSELL,
Attorneys.

MARCH 1973.



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In the Supreme Court of the
United States

OCTOBER TERM, 1971

No. 71-1182

G. RAYMOND ARNETT, as Director of the Department
of Fish and Game of the State of California,
Plaintiff and Respondent,
vs.

5 GILL NETS, etc.,
Defendant,
RAYMOND MATTZ,
Intervenor and Petitioner.

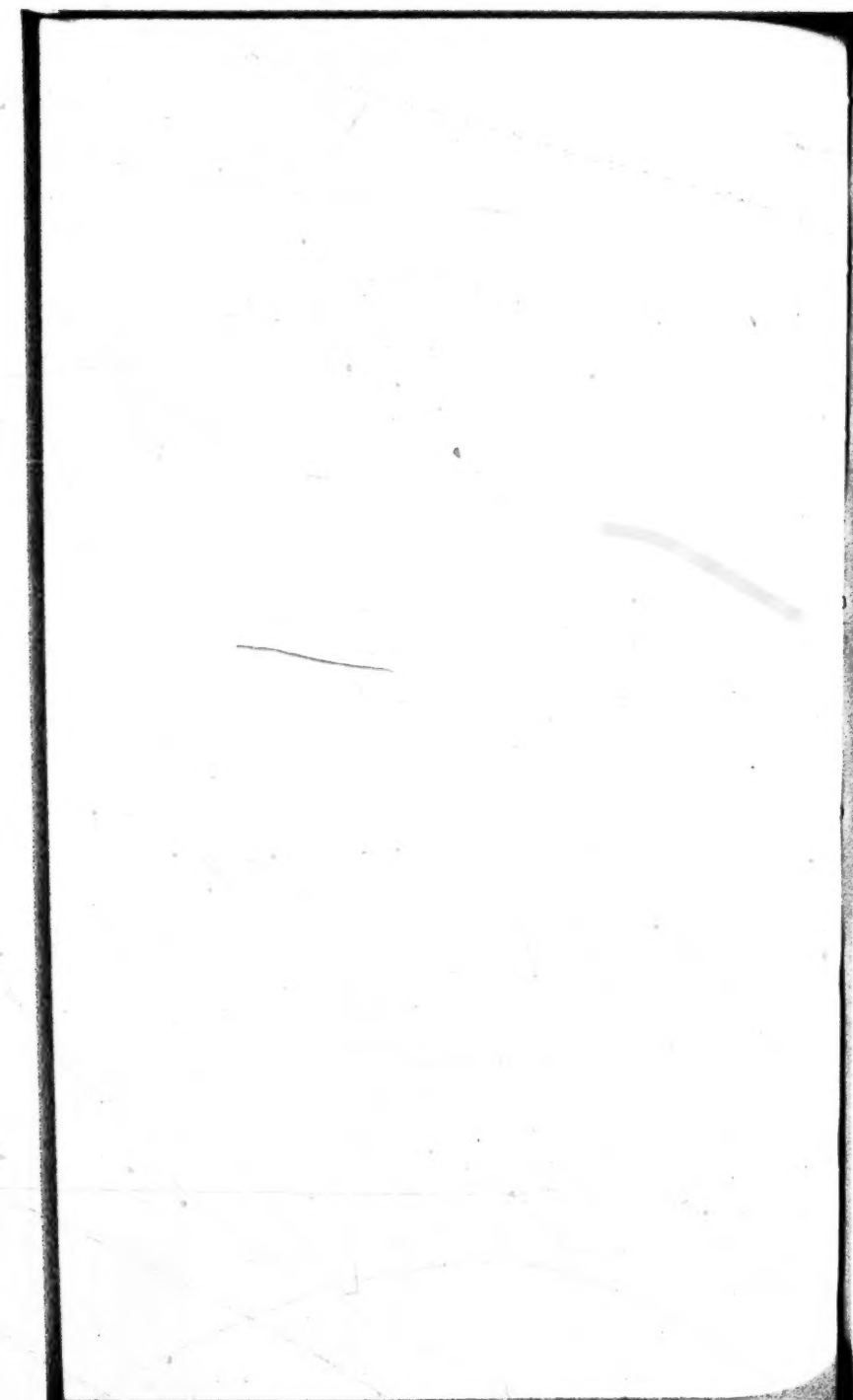
On Writ of Certiorari to the Court of Appeal of the
State of California, First Appellate District

Respondent's Supplementary Brief

EVELLE J. YOUNGER
Attorney General of the
State of California

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Attorneys for Respondent



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On Writ of Certiorari to the Court of Appeal of the
State of California, First Appellate District

Respondent's Supplementary Brief

The respondent submits this supplementary brief to provide further information on selected points raised in the briefs on file herein.

- I. **THE DEPARTMENT OF THE INTERIOR AND THE BUREAU OF INDIAN AFFAIRS REGARDED THE 1892 ACT AS TERMINATING THE RESERVATION STATUS OF THE OLD KLAMATH RIVER RESERVATION.**
- A. **The Bureau of Indian Affairs Ceased to Exercise Supervision Over the Old Klamath River Reservation After the 1892 Act.**

The petitioner has claimed that the Bureau of Indian Affairs (BIA) has consistently regarded the reservation

status of the former Klamath River Reservation as continuing in effect after the 1892 act. Petitioner's Reply Brief (hereinafter "PRB"), 21-22. In fact, the opposite is true. William B. Dougherty, the Superintendent of Hoopa Valley Agency, reported to the Commissioner of Indian Affairs in 1896,

"[The Indians living on the former Klamath River Reservation] *are now practically freed from administrative control*, and I think it is advisable to favor the development of their transition from Federal supervision to that of municipal authority, although the local government officers ignore the change effected in the political condition of the Indians by federal legislation, . . ." Annual Report of the Secretary of the Interior, Report of the Commissioner of Indian Affairs, v. II (1896), p. 125. (Emphasis added.)

The Superintendent noted in the following year that these Indians were subject to the jurisdiction of local governmental bodies; the Indians on the "old Klamath River Reservation," he said, were complaining about their treatment by local "municipal officers and courts, . . . *their own law being abolished.*" Annual Report of the Secretary of the Interior, Report of the Commissioner of Indian Affairs (1897), p. 115. (Emphasis added.)

Finally, in 1900, William B. Freer, the new Superintendent of the Hoopa Valley Agency, went further and defined the reservation status of the old Klamath River Reservation. He stated,

"*There are two tribes and two reservations under this agency, viz, the Hupa, living on the Hoopa Valley Reservation proper, and those called the Lower Klamath River Indians, living on the 'Connecting strip,' an extension of the reservation proper. . . . The extension to the reservation comprises the land on both sides of the Klamath River within a radius of a mile, and reaches from the line of the Hoopa Valley Reservation proper to what was the line of*

the old Klamath River Reservation, since thrown open, 20 miles above the mouth of the river." Annual Reports of the Department of the Interior, Indian Affairs, Report of Commissioner and Appendixes (1900), p. 204. (Emphasis added.)

Thus, the Superintendent clearly indicated that the BIA no longer considered the former Klamath River Reservation as in existence after the 1892 act, and that the BIA, beyond administering the trust allotments, no longer supervised these lands as part of the Hoopa Valley extension. This conclusion is also apparent from the fact that the annual reports of the Commissioner of Indian Affairs, after 1896, ceased to discuss the conditions of the Indians on the old Klamath River Reservation, although such conditions were elaborately discussed with respect to Indians on the Hoopa Valley reservation proper and the connecting strip.¹ Obviously the BIA and the Department of the Interior cannot now seek to re-create the old reservation by the simple expedient of issuing maps and statements; certainly these agencies cannot so easily abrogate the power of California to enforce its fishing laws on the Klamath River.

B. The BIA Maps Referred to by the Petitioner Show That the BIA No Longer Considered the Old Klamath River Reservation to Be in Existence After the 1892 Act.

The petitioner cited two maps of the Department of the Interior, compiled by the BIA in 1897 and 1898, in claiming that the BIA took the position that the 1892 act did not terminate the reservation status of the old Klamath River Reservation. PRB, 21-22. In fact, these maps show that the BIA took the opposite position.

1. See, e.g., Annual Report of the Secretary of the Interior, Report of the Commissioner of Indian Affairs, v. II (1896), pp. 125-27; Annual Report of the Secretary of the Interior, Report of the Commissioner of Indian Affairs (1897), pp. 115-17; Annual Reports of the Department of the Interior, Indian Affairs, Report of Commissioner and Appendixes (1900), pp. 204-18.

The 1897 and 1898 maps, and also the 1892 map referred to in the petitioner's opening brief, at page 24, contain a legend indicating that an area constituting an Indian reservation is designated by brown coloration.² Such coloration covers the lands of the former Klamath River Reservation on the 1892 map, and also on other maps contained in the annual reports of the Secretary of the Interior through 1895. But similar coloration is also used in designating the lands of the northern half of the Colville reservation through the 1895 reports; since the latter reservation was terminated by the 1892 Colville act, according to the *Seymour* Court, the continued use of such coloration shows that the departmental cartographers were in arrears in bringing their maps up to date.

However, the annual map published by the BIA in 1896, and also the 1897 and 1898 maps referred to by the petitioner, show that the brown coloration has been removed from the area covered by the former Klamath River Reservation, and also from the area covered by the northern half of the Colville reservation.³ The area covered by the former Klamath River Reservation is clearly distinguished on these maps from the areas covered by the Hoopa Valley reservation and the connecting strip, which retained their brown coloration. A black boundary is drawn on these maps around the area covered by the former Klamath River Reservation; but a similar boundary is drawn on the 1897 map around the northern half of the Colville reservation, thus indicating

2. See Report of the Commissioner of Indian Affairs to the Secretary of the Interior, 61st Annual Report (1892); Annual Report of the Secretary of the Interior, Commissioner of Indian Affairs (1897); Annual Report of the Secretary of the Interior, Commissioner of Indian Affairs (1898).

These maps were affixed as appendixes at the end or near the middle of these annual reports, and carried no page number.

3. Copies of these maps have not been appended because the coloration of the maps is not picked in the photocopying process.

that this line apparently only denotes those areas in which trust allotments and Indian settlements are administered by the BIA.

Thus, the 1897 and 1898 maps clearly support the position of the respondent. The combination of these maps and the statements of the BIA officials, cited above, lead inescapably to the conclusion that the BIA regarded the former Klamath River Reservation as no longer in existence after the 1892 act. This conclusion, coupled with the recorded expressions of the 1892 Congress that the area no longer retained reservation status, amply distinguishes this case from that before the *Seymour* Court, and shows that the 1892 act terminated the reservation status of these lands.

C. The Superintendent of the Hoopa Valley Agency Took the Position in 1933 That the Lands of the Former Klamath River Reservation Were Restored to the "Public Domain."

According to the trial commissioner's proposed decision in the pending Court of Claims case, at pages 63-64, a letter written by the Special Allotting Agent of the BIA and approved by O. M. Boggess, the Superintendent of the Hoopa Valley Agency (Appendix, 13), stated,

"The unallotted portion of [the former Klamath River Reservation] . . . was *returned to the public domain* under authority of the Act of Congress approved June 17, 1892." *Short v. United States*, pending No. 102-63 (Ct. Cl.) pp. 63-64. (Emphasis added.)

This statement shows that the BIA considered these lands as restored to the public domain by the 1892 act.

II. THE PURPOSE FOR WHICH THE KLAMATH RIVER RESERVATION WAS CREATED CEASED TO EXIST AFTER THE 1892 ACT.

The purpose for which the old Klamath River Reservation was created ceased to exist after the 1892 act was passed. The reservation had been originally created in 1855, but a flood in 1861 destroyed most of the arable land of the

reservation; as a result, many of the Indians left the area and settled elsewhere.⁴ Many non-Indian settlers then moved into the lands of the old reservation, and occupied most of these lands. Congress was anxious to protect the existing claims of the settlers, and to encourage the homestead settlement of these lands; it had considered proposed legislation to that effect for many years, and most of the proposals made no provision for allotments to the Indians. See, *e.g.*, H.R. 60, 47th Cong., 1st Sess. (1881); H.R. 113, 51st Cong., 1st Sess. (1890); H.R. Rep. No. 3454, 46th Cong., 2nd Sess. (1880); H.R. Rep. No. 1354, 46th Cong., 2nd Sess. (1880). But the Department of the Interior was anxious to protect the homes of the Indians, many of whom had returned to the old reservation, against intrusion by the settlers. H.R. Rep. No. 1148, 47th Cong., 1st Sess. 2 (1882). As the Commissioner of Indian Affairs stated in his 1885 annual report.

"It is my intention to ask at an early day for legislation suitable to the wants of these Indians. They do not need all the lands at present reserved for their use, but they should be permanently settled, either individually or in small communities, and their lands secured to them by patent before any portion of their reservation is restored to the public domain." Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1885), pp. XLVIII-XLIX.

To protect the Indians' homes, the Department of the Interior prevailed on the President to issue an executive order in 1891 re-creating the old reservation. See *Short v. United States*, *supra*, 49-50.

4. The history of the Klamath River Reservation is described at length in *United States v. Forty-Eight Pounds of Rising Star Tea*, 38 Fed. 403 (1888); *Donnelly v. United States*, 228 U.S. 243 (1913); *Elser v. Gill Net No. One*, 246 Cal. App.2d 30 (1966); *Short v. United States*, pending No. 102-63 (Ct. Cl.); 65 I.D. 59 (1958); 33 L.D. 205 (1904).

In its original form, H.R. 38, the bill which was finally passed in 1892, provided for homestead settlement of these lands, authorized the Secretary of the Interior to "reserve" lands for the Indians' benefit, and made no provision for allotments to the Indians. At the behest of the Department of the Interior, the bill was amended in the Senate to provide for such allotments. 23 Cong. Rec. 3918 (1892). Thus, the 1892 act constituted a compromise between Congress, which wanted to promote the homestead settlement of these lands, and the Department of the Interior, which wanted to protect the Indians from expulsion from the area by the settlers.

Importantly, the Indians were not to be given the right to use the lands of the old reservation for historic tribal functions, since the lands settled by the homesteaders were to be "disposed of, as are other lands of the same class or quality, under the general laws of the United States." H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892). Thus, the homesteaders were to receive a fee title to their property similar to that enjoyed by homesteaders elsewhere. This meant that the Indians were no longer entitled to enjoy the right to fish without restriction on the old reservation lands, a right which they had enjoyed when the reservation was in existence.

It is thus clear that the reservation was created in 1891 in order to protect the Indians from being expelled from the area by the intrusion of settlers. This form of protection was abandoned by the passage of the 1892 act, which sought to protect the Indians from such expulsion by the issuance of trust allotments. The issuance of the allotments was an alternative to the form of protection previously afforded by the reservation. The allotments thus eliminated the need for the continued existence of the reservation, and the purpose for which the reservation was created ceased to exist after the 1892 act was passed.

Moreover, the 1892 act only allowed the Indians to receive trust allotments on surplus lands which were not occupied by the settlers, which is evident from the fact that the act provided that such settled lands were "exempt" from such allotments. This is contrary to the situation before the *Seymour* Court, where the Court stressed that the act in question merely allowed settlers to obtain "surplus" lands which were not used by the Indians. In fact, there is no indication in *Seymour* of a congressional concern to promote settlement and protect existing claims of settlers, and the 1906 Colville act indicates that the opposite was the case. See 34 Stat. 82, § 9 (1906).

That the 1892 Congress intended to entirely abandon the protection previously afforded by the reservation is evident from the repeated congressional emphasis, both in the Senate and the House, that the reservation was already abandoned, and no longer function as a *de facto* reservation. This emphasis was apparently vital to the act's passage, since Congress was apparently not inclined to permit the intrusion of homesteaders on lands which Congress wished to continue as a reservation.

The Senate, which amended H.R. 38 to include the allotment provisions, did not regard the provision as consistent with the purposes of a reservation. The bill's spokesman in the Senate repeatedly emphasized that the old reservation was not considered as in existence anyway. Furthermore, the bill, even though containing the allotment provision, was not expected to promote tribal cohesion; the Senate spokesman declared during the congressional debate that "[t]here is an Indian reservation within 20 miles of the river, where these Indians can go if they want to do so." 23 Cong. Rec. 3919 (1892). As anticipated by the Senate, many of the Indians left the old reservation after the act's passage, and, as noted by the Department of the Interior, "were relocated on the connecting strip and elsewhere, and

the Klamath River Tribe became widely scattered." 65 I.D. 59, 64 (1958).⁵

The dominant motivation behind the 1892 act, from the congressional standpoint, was, of course, to promote the rapid settlement of the lands of the old reservation by the homesteaders. The allotment provision was added to H.R. 38 as an amendment, and it can hardly be asserted that the amendment reveals the dominant congressional purpose. In fact, under section 334 of the General Allotment Act of 1887, Indians on the old reservation were entitled to allotments even if the area lost its reservation status, (25 U.S.C. § 334), and hence this amendment did not change the basic nature of H.R. 38.

Even the Department of the Interior, which successfully campaigned to have the allotment provision inserted in the act, did not regard the provision as consistent with the purposes of the reservation. A bill similar to H.R. 38 was submitted to Congress in 1881 (H.R. 60, 47th Cong., 1st Sess. (1881)), and the Commissioner of Indian Affairs indicated that he would oppose the bill unless it was amended to include an allotment provision. In urging the amendment, the Commissioner, who took the position that the reservation was actually in existence at that time (*United States v. Forty-Eight Pounds of Rising Star Tea*, 38 Fed. 403, 405 (N.D. Cal. 1888)), stated,

"The lands embraced within the said reservation are not needed (as a reservation) for Indian purposes, but that the Indians residing thereon should be protected in the peaceful occupancy and enjoyment of their homes . . . is certainly beyond dispute." H.R.

5. The petitioner, in his closing brief, argues that this departmental decision was impeached in many particulars by the trial commissioner's recommendations in the *Short* case (PRB, 18), an interesting argument in light of the petitioner's reliance on the departmental decision in his opening brief (p. 23). In any event, the *Short* commissioner, while questioning many findings in the departmental decision, did not question the specific finding quoted above.

Rep. 1148, 47th Cong., 1st Sess. 2 (1882). (Emphasis added.)

Thus, the Comissioner, who was responsible for the inclusion of the allotment provision in H.R. 38, regarded the allotment provision as an alternative form of protection to that afforded by the reservation, as did Congress.

We are mindful that the mere allowance of trust allotment, in attempting to end nomadic ways of the Indians, does not in itself terminate a reservation. *United States v. Celestine*, 215 U.S. 278 (1909). In fact, section 331 of the General Allotment Act of 1887 expressly provides for the creation of "allotments on such reservations." Given other circumstances, however, the allowance of such allotments can constitute part of an overall congressional effort to end federal supervision over an entire reservation area, and hence end the reservation itself. *United States v. Pelican*, 232 U.S. 442 (1914). Here, such an effort is evident from the repeated congressional emphasis of the non-reservation status of these lands, from the fact that the dominant purpose behind the act was to promote the homestead settlement of these lands, and—most importantly—from the fact that the purpose for which the reservation was created ceased to exist after 1892. These facts amply distinguish this case from that before the *Celestine* and *Seymour* Courts. At the very least, these circumstances explain the BIA's failure to treat this area as a reservation, beyond administering the trust allotments, in the years following the passage of the 1892 act.

III. THE MAP CONTAINED IN THE 1909 PRESIDENTIAL PROCLAMATION EXCLUDES THE LANDS OF THE FORMER KLAMATH RIVER RESERVATION FROM THE HOOPA VALLEY EXTENSION.

The petitioner has contended that the map contained in the 1909 presidential proclamation, appended to the

respondent's opening brief as Appendix A, does not show the boundary line of the Hoopa Valley reservation extension as excluding the lands of the former Klamath River Reservation. PRB, 22. The petitioner claims that other maps appended to the respondent's brief show the northern boundary of the extension as extending into Township 12 North, whereas the map contained in the presidential proclamation shows the northern boundary of the extension as only extending into Township 11 North. In fact, the quadrangle map prepared by the Geological Survey, appended to the respondent's brief as Appendix C, clearly shows the northern boundary of the extension as only extending into Township 11 North, and not as extending into Township 12 North. Also, both maps show the northern boundary of the extension as falling between Range 2 East and Range 3 East. Hence, the boundary line on the map contained in the presidential proclamation clearly denotes the northern end of the extension.

The petitioner also claims that the presidential proclamation states that the "lands shown on its maps 'constitute a part [not all] of the Hoopa Valley Indian Reservation.'" PRB, 22. However, the proclamation, in referring to the lands constituting a "part" of the reservation, expressly referred only to those "certain lands" which were thereafter to be included in the Trinity National Forest, not to all the lands shown on the maps. See Brief for the Respondent, Appendix A, p. 1. That is, the small, individual blocks of land shown on the map, which were thereafter to be included in the national forest, only constituted a "part" of the reservation, and obviously did not constitute the entire reservation. Thus, the petitioner has misread the terms of the proclamation.

**IV. THE DECISION OF THE DEPARTMENT OF THE INTERIOR
CITED BY THE UNITED STATES IS NOT HELPFUL IN DECID-
ING THE ISSUE BEFORE THIS COURT.**

The United States, although not having filed its brief in this matter at the time that the Respondent's Supplementary Brief was prepared, has informally indicated to the respondent that it intends to cite an administrative decision of the Department of the Interior contained in 33 L.D. 205 (1904). This decision dealt with the question whether an allotment issued under the 1892 act was located on or off the former Klamath River Reservation, for purposes of determining whether section 1 or section 4 of the General Allotment Act of 1887 applied to the allotment. The decision concluded that the old Klamath River Reservation remained in effect after the 1892 act, and hence that the allotment was covered by section 1 of the 1887 act. The reasoning contained in the decision is of little help in resolving the question here. The decision is expressly limited to a construction of the bare language of the 1892 act, and expressly noted that "subjects of historical interest" were not of "controlling importance" in its conclusions. 33 L.D. at 219. In construing this statutory language, the decision placed its primary emphasis on the single allusion in the act to Indians residing on "said reservation." *Ibid.* This seems a frail basis for the conclusion described in the decision.⁶ It ignores the many other references in the

6. The opening brief for the respondent pointed out that this single statement was a reference back to lands "in what was [the] Klamath River Reservation," and that the use of the past tense in this latter reference indicates that the former reference is not intended to imply that the lands should continue to retain reservation status. Brief for the Respondent, p. 15, n. 5. Moreover, the decision's interpretation of this single statement is clearly inconsistent with the obvious congressional understanding that the area no longer constituted a reservation.

act to the "lands" on which the Indians reside,⁷ ignores the use of the past tense in describing the Klamath River reservation and ignores the repeated statements of the act's authors that the reservation was not considered to be in existence. It also ignores the act's failure to refer to the lands as being restored to the "public domain," which the petitioner urges as the primary similarity between this case and *Seymour*. Either this shows that the administrative decision failed to consider the factors which *Seymour* found persuasive, and thus that the decision is of little help here, or that the decision considered the absence of such terminology to be unimportant in light of the act's overall effect, as urged by the respondent. In any event, this Court is certainly competent to evaluate the bare language of the statute for itself, and thus the reasoning supplied by the decision is of little help here.

The decision is entitled to a certain historical significance, of course, by the mere fact that it represents a departmental viewpoint at an early date. However, this significance is greatly reduced by the fact that the BIA, which is responsible for administering reservation lands, did not regard the former Klamath River Reservation as in existence, and did not administer it as such. Also, since the decision was issued to the General Land Office, the forerunner of the Bureau of Land Management, the decision apparently assumed no significance in the actual administration of lands in the Hoopa Valley area by the BIA. Certainly the BIA's actual practice in supervising its Indian wards is more persuasive than a legal construction of the language of the 1892 act in evaluating the administrative response to the act. Hence, the decision should be accorded little significance in deciding the issue here.

7. - Congress continued to use the word "lands," and avoid the use of the word "reservation," in referring to the former Klamath River Reservation in later acts. In 1917, Congress, in amending the provision of the 1892 act relating to the distribution of proceeds to the Indians, referred to "Indians and their children now residing on said lands . . ." 29 Stat. 976.

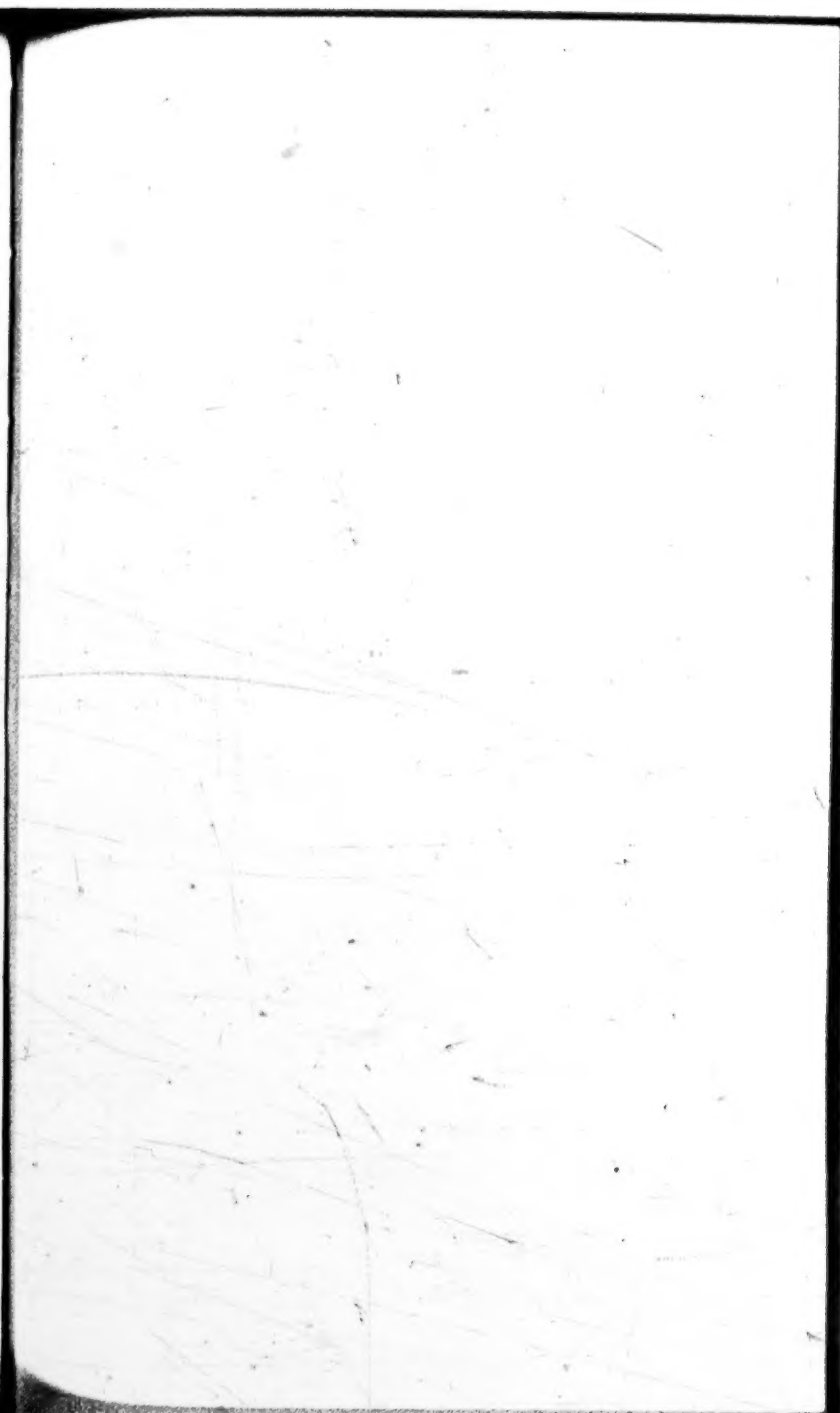
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the California Court of Appeal should be affirmed.

EVELLE J. YOUNGER
Attorney General of the
State of California

CARL BORONKAY
Assistant Attorney General

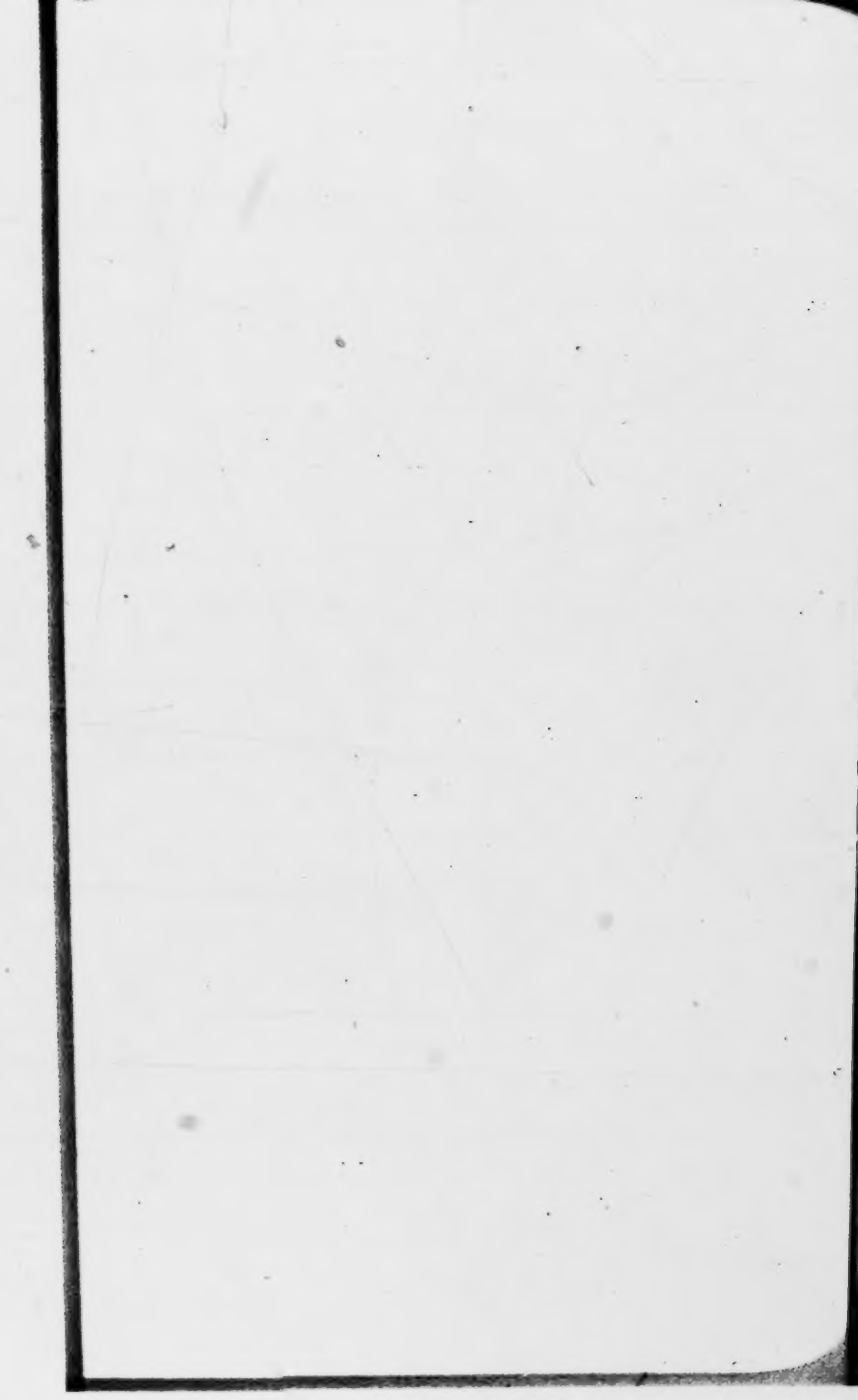
RODERICK WALSTON
Deputy Attorney General
Attorneys for Respondent



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1132

RAYMOND MATTZ,

PETITIONER

v.

G. RAYMOND ARNETT, AS DIRECTOR OF
THE DEPARTMENT OF FISH AND GAME
OF THE STATE OF CALIFORNIA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA, FIRST APPELLATE
DISTRICT

PETITIONER'S SECOND REPLY BRIEF ON THE MERITS

I

INDIAN ALLOTMENTS WERE NOT SUB-
ORDINATE TO NON-INDIAN HOMESTEADS
UNDER THE ACT OF JUNE 17, 1892

In support of his claim that the Act of June 17, 1892, was intended to abolish the lower twenty miles of the Hoopa Extension Respondent's Supplementary Brief states (at 8):

"[T]he 1892 act only allowed the Indians to receive trust allotments on surplus lands which were not occupied by the settlers, which is evident from the fact that the act provided that such settled lands were 'exempt' from such allotments. This is contrary to the situation before the Seymour Court, where the Court stressed that the act in question merely allowed settlers to obtain 'surplus' lands which were not used by the Indians.

Respondent's statement is untrue. The 1892 Hoopa Extension Act provided that even a prior good faith settler could not obtain land which an Indian wanted for an allotment if "Indians have resided upon said tract for four months prior to the passage of this act." And, as pointed out in Petitioner's Reply Brief (at page 19, fn.8), Indians must have occupied at least 40 per-

cent of the lower twenty miles of the Extension, for they were allotted nearly 40 percent of the land there.

II

RESPONDENT HAS MISREAD THE MAPS ON WHICH HE BASES HIS INTERPRETATION OF THE PRESIDENTIAL PROCLAMATION OF MARCH 2, 1909

Respondent rests his interpretation of the 1909 Presidential Proclamation upon a diagonal line on the order's two maps. According to Respondent, that unlabelled line is the oceanward end of the Hoopa Extension because it is in the same location as lines which certain other maps¹ show as the north end of the Extension.

The Proclamation's diagonal line and the other maps' lines are not in the same place, however. The 1909 order's line runs through only section 12 of T. 11 N., R. 2 E. and section 7 of T. 11 N., R. 3 E. (Appendix A to Respondent's Opening Brief.) By contrast, the 1952 Geological Survey Map on which Respondent principally relies (Appen-

1. Those other maps are Appendices B, C, and D of Respondent's Opening Brief. Petitioner has already explained why those maps are not persuasive on where the reservation ends. (Petitioner's Reply Brief On The Merits at 23.)

dix C to Respondent's Opening Brief) shows the end of the Extension as starting in section 2 of T. 11 N., R. 2 E., running through section 35 of T. 12 N., R. 2 E., and ending in section 36 of T. 12 N., R. 2 E.

Petitioner pointed this out in his Reply Brief, but must reiterate the point in more detail here, because Respondent's Supplementary Brief claims that Petitioner's Reply Brief is in error.

The diagonal line in the 1909 Proclamation was nothing more than the northern limit of isolated tracts being added to the Trinity National Forest from the Hoopa Reservation. Moreover, Executive Order No. 1480 of February 17, 1912, vacated the Presidential Proclamation of March 2, 1909.

III

REPORTS OF THE BIA COMMISSIONER SUPPORT RESERVATION STATUS FOR THE LOWER TWENTY MILES OF THE HOOPA EXTENSION

A. The Text Of The Commissioner's Reports Supports Reservation Status.

In 1892 Indians received 161 allotments on the lower twenty miles of the Hoopa Extension. (May 22, 1972, Report of the Commissioner in Jessie Short v. United States,

Ct.Cl. No. 102-63.) The 1893 Report of the Indian Affairs Commissioner described those allotments as "on reservation." (Sixty Second Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior at 23.)²

Respondent has not cited one single Commissioner's Report to the contrary.

B. The Maps Affixed To the Commissioner's Reports Show The Lower Twenty Miles Of The Extension As Part Of A Reservation

Petitioner's Reply Brief explained (at 21-22) why the maps in the 1897 and 1898 Commissioner's Reports support reservation status for the lower twenty miles of the Hoopa Extension. Those maps show the Extension running all the way to the Pacific. That is to be contrasted with the maps' treatment of the North Half of the Colville Reservation which Seymour v. Superintendent, 368 U.S. 351, held to have been terminated by an act passed only two

2. See also 33 L.D. 205 (1904). Contrary to Respondent's Supplementary Brief (at 13), that decision was not by the General Land Office but by the Acting Secretary of the Interior.

weeks after the statute involved in this case. The North Half of Colville is only an outline in 1897 and disappears entirely in 1898.

Respondent's Supplementary Brief says (at 4) that the lower twenty miles of the Extension is uncolored, like Colville's North Half on the 1897 map. Petitioner does not agree. The color is simply difficult to see because the strip is so narrow and runs through a similarly colored band that edges the map. On the copies available to Petitioner, the reservation coloring of the lower twenty is particularly clear in the map annexed to the Commissioner's Report in Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1904. Even clearer is the new style map in Vol. II (Indian Affairs) of Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1907.

In addition--and unlike Colville's North Half--the lower twenty miles of the Extension do not vanish completely from the 1898 map.³

3. Petitioner is also unable to locate on the 1897 or 1898 maps the black line which Respondent's Supplementary Brief (at 4-5) claims is drawn around the lower twenty miles [footnote continued on next page]

C. Hoopa Agents' Reports Attached
To Commissioners' Reports Are Not
Authoritative

Respondent's Supplementary Brief (at 2-3) places heavy reliance on three reports by Hoopa Agency Superintendents to the Commissioner of Indian Affairs.

Reports of area superintendents are routinely attached as appendices to the Commissioners' annual reports. Obviously, the Commissioner's Report in 1893 and the maps described above are the documents to be examined to determine the official BIA position. The views of low-ranking, non-legal employees are entitled to little or no weight. (See New Town v. United States, 454 F.2d 121, 123 (8th Cir. 1972).)

IV

THE 1933 HOOPA AGENCY SUPERINTENDENT
DID NOT CONSIDER THE LOWER TWENTY
MILES OF THE EXTENSION TERMINATED

On January 12, 1933, the allotting agent at Hoopa wrote a letter concerning who was entitled to allotments on the Hoopa Square. (May 22, 1972, Report of the Commissioner in Jessie Short v. United of the Extension. The only division within the Hoopa Reservation is between the Square and the entire Extension from the Square to the Ocean.

States, supra, at 62, 63.) This long letter, only a minute part of which is reproduced at page 5 of Respondent's Supplementary Brief, concluded that Indians of the entire Extension and of the Square were equally entitled. (Id. at 65.)

In the course of the letter the allotting agent did say that the Act of June 17, 1892, returned unallotted land on the lower twenty miles of the Extension to the public domain (id. at 64); and the Hoopa Agency Superintendent, O. M. Boggess, did "read and approve" the letter (id. at 63). However, it seems fairly clear that Mr. Boggess was only approving the letter's decision on who was to receive allotments. Nothing suggests that Mr. Boggess had changed the position he stated to Congress in September of 1932, less than four months before. Then he said that the Extension ran all the way to the coast and that it and the Square were "all classed by the Indian office as one reservation." (A.14.)

V

A STATEMENT BY THE INDIAN AFFAIRS COMMISSIONER IN 1881 HAS NO BEARING ON THE MEANING OF THE ACT OF JUNE 17, 1892

Respondent's Supplementary Brief

quotes (at 9) the Commissioner of Indian Affairs as saying in 1881 that the lands of the old Klamath River Reservation would not be needed as a reservation if the Indians there were given allotments. From this Respondent infers (at page 10, ¶ 1) that the Commissioner felt the same way in 1892.

That conclusion does not follow. The Commissioner of Indian Affairs was hardly likely to have wanted Congress to abolish in spring 1892 a reservation area (the Hoopa Extension) which the President had created on October 16, 1891.

CONCLUSION

This court should reverse the judgment below and hold that the lower twenty miles of the Hoopa Extension are still part of a reservation.

Dated: March 23, 1973

Respectfully submitted,
LEE J. SCLAR
BRUCE R. GREENE
ROBERT J. DONOVAN
WILLIAM P. LAMB
CALIFORNIA INDIAN LEGAL
SERVICES

By: _____
Lee J. Sclar

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MATTZ *v.* ARNETT, DIRECTOR, DEPARTMENT OF FISH AND GAME

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST
APPELLATE DISTRICT

No. 71-1182. Argued March 27-28, 1973—Decided June 11, 1973

Petitioner, a Yurok, or Klamath River, Indian, intervened in a forfeiture proceeding, seeking the return of five gill nets confiscated by a California game warden. He alleged that the nets were seized in Indian country, within the meaning of 18 U. S. C. § 1151, and that the state statutes prohibiting their use did not apply to him. The state trial court found that the Klamath River Reservation in 1892 "for all practical purposes almost immediately lost its identity," and concluded that the area was not Indian country. The state Court of Appeal affirmed, holding that since the area had been opened for unrestricted homestead entry in 1892, the earlier reservation status of the land had terminated. Indian country is defined by § 1151 as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." The Klamath River Reservation was established by Executive Order in 1855 and included the area in question. In 1891, by Executive Order, the Klamath River Reservation was made part of the Hoopa Valley Reservation. The Act of June 17, 1892, provided that "all of the lands embraced in what was Klamath River Reservation" reserved under the 1855 Executive Order, are "declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights *Provided*, That any Indian now located upon said reservation may, at any time within one year . . . apply to the Secretary of the Interior for an allotment of land And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract . . . upon which any village or settlement of Indians is now located, and may set apart the same for the

Syllabus

permanent use and occupation of said village or settlement of Indians." The Act further provided that proceeds from the sale of the lands "shall constitute a fund . . . for the maintenance and education of the Indians now residing on said lands and their children." *Held*: The Klamath River Reservation was not terminated by the Act of June 17, 1892, and the land within the reservation boundaries is still Indian country, within the meaning of 18 U. S. C. § 1151. Pp. 12-24.

(a) The allotment provisions of the 1892 Act, rather than indicating an intention to terminate the Reservation, are completely consistent with continued reservation status. *Seymour v. Superintendent*, 368 U. S. 351. Pp. 14-15.

(b) The reference in the Act to the Klamath River Reservation in the past tense did not manifest a congressional purpose to terminate the Reservation, but was merely a convenient way of identifying the land, which had just recently been included in the Hoopa Valley Reservation. P. 16.

(c) The Act's legislative history does not support the view that the Reservation was terminated, but by contrast with the final enactment, it compels the conclusion that efforts to terminate by denying allotments to the Indians failed completely. Pp. 17-22.

(d) A congressional determination to terminate a reservation must be expressed on the face of the statute or be clear from the surrounding circumstances and legislative history, neither of which obtained here. Pp. 22-23.

(e) The conclusion that the 1892 Act did not terminate the Reservation is reinforced by repeated recognition thereafter by the Department of the Interior and by the Congress. Congress has recognized the Reservation's continued existence by extending, in 1942, the period of trust allotments, and in 1958, by restoring to tribal ownership certain vacant and undisposed-of ceded lands in the Reservation. P. 23.

20 Cal. App. 3d 729, 97 Cal. Rptr. 894, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1182

Raymond Mattz, Petitioner,

v.

G. Raymond Arnett, Etc.

On Writ of Certiorari to
the Court of Appeal of
California, First Appel-
late District.

[June 11, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Our decision in this case turns on the resolution of the narrow question whether the Klamath River Indian Reservation in northern California was terminated by Act of Congress or whether it remains "Indian country," within the meaning of 18 U. S. C. § 1151.¹ When

¹ 18 U. S. C. § 1151 defines the term "Indian country" to include, *inter alia*, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent"

18 U. S. C. § 1162 (a) provides that, with respect to Indian country within California, that State "shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State" Section 1162 (b) provides, however, "Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

Finally, the California Fish & Game Code, § 12300, as amended, reads:

"Irrespective of any other provision of law, the provisions of this code are not applicable to California Indians whose names are in-

established, the reservation was described as "a strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River" for a distance of approximately 20 miles, encompassing an area not exceeding 25,000 acres. This description is taken from President Franklin Pierce's Executive Order issued November 16, 1855, pursuant to the authority granted by the Act of March 3, 1853, 10 Stat. 226, 238, and the Act of March 3, 1855, 10 Stat. 686, 699.²

Petitioner Raymond Mattz is a Yurok, or Klamath River, Indian who, since the age of nine, regularly fished, as his grandfather did before him, with dip, gill, and trigger nets, at a location called Brooks Ripple on the Klamath River. On September 24, 1969, a California game warden confiscated five gill nets owned by Mattz. The nets were stored near Brooks Ripple, approximately 200 feet from the river, and within 20 miles of the river's mouth.

The respondent Director of the Department of Fish and Game instituted a forfeiture proceeding in state court. Mattz intervened and asked for the return of his nets. He alleged, among other things, that he was an enrolled member of the Yurok Tribe, that the nets were seized within Indian country, and that the state statutes prohibiting the use of gill nets, Cal. Fish & Game Code §§ 8664, 8686, and 8630, therefore were inapplicable to him. The state trial court, relying on *Elser v. Gill Net*

scribed upon the tribal rolls, while on the reservation of such tribe and under those circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States [18 U. S. C. § 1162]."

² The Executive Order is reproduced in 1 C. Kappler, *Indian Affairs—Laws and Treaties* 817 (1904) (hereinafter Kappler).

At the end of this opinion, as the Appendix, is a map of the Klamath River Reservation. The area described in the text is indicated as the "Old Klamath River Reservation."

Number One, 246 Cal. App. 2d 30, 54 Cal. Rptr. 568 (1966), found that the Klamath River Reservation in 1892 "for all practical purposes almost immediately lost its identity," and concluded that the area where the nets were seized was not Indian country. The court thereby disposed of petitioner's primary defense to the forfeiture. It did not reach other issues bearing upon the application of the California statutes to Indian country and the existence of Indian fishing rights there.

On appeal, the state Court of Appeal affirmed, holding that, inasmuch as the area in question had been opened for unrestricted homestead entry in 1892, the earlier reservation status of the land had terminated. 20 Cal. App. 3d 729, 97 Cal. Rptr. 894 (1971). The Supreme Court of California, one judge dissenting, denied a petition for hearing. See 20 Cal. App. 3d, at 735, 97 Cal. Rptr., at 898. We granted certiorari, 409 U. S. 1124 (1973), because the judgments of the state courts appeared to be in conflict with applicable decisions of this Court.

We now reverse. The reversal, of course, does not dispose of the underlying forfeiture issue. On remand, the questions relating to the existence of Mattz' fishing rights and to the applicability of California law notwithstanding reservation status will be addressed. We intimate no opinion on those issues.

I

While the current reservation status of the Klamath River Reservation turns primarily upon the effect of an 1892 Act of Congress which opened the reservation land for settlement, the meaning and effect of that Act cannot be determined without some reference to the Yurok Tribe and the history of the reservation between 1855 and 1892.

³ See Petition for Certiorari, App. B, 4-5.

The Yurok Indians apparently resided in the area of the lower Klamath River for a substantial period before 1855 when the Klamath River Reservation was established. Little is known of their prior history. There are sources, however, that provide us with relatively detailed information about the tribe, its culture, living conditions, and customs for the period following 1855.⁴ That the tribe had inhabited the lower Klamath River well before 1855 is suggested by the name. Yurok means "down the river." The names of the neighboring tribes, the Karok and the Modok, mean, respectively, "up the river" and "head of the river," and these appellations, as would be expected, coincide with the respective homelands. Powers 19; Kroeber 15.⁵

⁴ A. Kroeber, *Handbook of the Indians of California*, cc. 1-4, in *Bulletin 78, Bureau of American Ethnology* 1-97 (1925) (hereinafter Kroeber); S. Powers, *Tribes of California*, cc. 4 and 5, in 3 *Contributions to North American Ethnology* 44-64 (1877) (hereinafter Powers). Various Annual Reports of the Commissioner of Indian Affairs provide further information; see, for example, the 1856 Report of the Commissioner of Indian Affairs 249-250 (hereinafter Report).

⁵ Kroeber, in the preface to his work, suggests that the factual material contained in Powers' manuscript is subject to some criticism. Kroeber's reference to Powers deserves reproduction in full here:

"I should not close without expressing my sincere appreciation of my one predecessor in this field, the late Stephen Powers, well known for his classic 'Tribes of California,' one of the most remarkable reports ever printed by any government. Powers was a journalist by profession and it is true that his ethnology is often of the crudest. Probably the majority of his statements are inaccurate, many are misleading, and a very fair proportion are without any foundation or positively erroneous. He possessed, however, an astoundingly quick and vivid sympathy, a power of observation as keen as it was untrained, and an invariably spirited gift of portrayal that rises at times into the realm of the sheerly fascinating.

"Anthropologically his great service lies in the fact that with all the looseness of his data and method he was able to a greater

By the Act of March 3, 1853, 10 Stat. 226, 238, the President was "authorized to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes." The Act of March 3, 1855, 10 Stat. 686, 699, appropriated funds for "collecting, removing, and subsisting the Indians of California . . . on two additional military reservations, to be selected as heretofore *Provided*, That the President may enlarge the quantity of reservations heretofore selected, equal to those hereby provided for." President Pierce then issued his order of November 16, 1855, specifying the Klamath River Reservation and stating, "Let the reservation be made, as proposed." Kappler 817.

The site was ideally selected for the Yuroks. They had lived in the area; the arable land, although limited, was "peculiarly adapted to the growth of vegetables," 1856 Report 238; and the river, which ran through a canyon its entire length, abounded in salmon and other fish. *Id.*; 1858 Report 286.⁶

In 1861 nearly all the arable lands on the Klamath River Reservation were destroyed by a freshet, and, upon

degree than anyone before or after him to seize and fix the salient qualities of the mentality of the people he described. The ethnologist may therefore by turns writhe and smile as he fingers Powers's pages, but for the broad outlines of the culture of the California Indian, for its values with all their high lights and shadows, he can still do no better than consult the book. With all its flimsy texture and slovenly edges, it will always remain the best introduction to the subject." Kroeber ix.

⁶ Of this area one agent stated, "No place can be found so well adapted to these Indians, and to which they themselves are so well adapted, as this very spot. No possessions of the Government can be better spared to them. No territory offers more to these Indians and very little territory offers less to the white man. The issue of their removal seems to disappear." 1885 Report 266.

recommendation of the local Indian agent, some of the Indians were removed to the Smith River Reservation, established for that purpose in 1862. Only a small number of Yuroks moved to the new reservation, however, and nearly all those who did move returned within a few years to the Klamath River. *Crichton v. Shelton*, 33 I. D. 205, 208 (1904); Kappler 830; 1864 Report 122. The Smith River Reservation was then discontinued. Act of July 27, 1868, 15 Stat. 198, 221.

The total Yurok population on the Klamath River Reservation in the 1860's cannot be stated with precision. In 1852, based in part on a rough census made by a trader, it was estimated at 2,500. Kroeber 16-17.

⁷ It is interesting to note that Powers believed the Yurok population at one time far exceeded 2,500 and perhaps numbered over 5,000. This was, as Powers stated, "before the whites had come among them, bringing their corruptions and their maladies" Powers 59. The renowned Major John Wesley Powell, who was then in charge of the United States Geographical and Geological Survey of the Rocky Mountain Region, Department of the Interior, placed little faith in Powers' figures and requested that he modify his estimates. Powers expressed his displeasure at this in a letter to Major Powell stating, in characteristic fashion,

"I have the greatest respect for your views and beliefs, and, with your rich fund of personal experience and observation; if you desire to cut out the paragraph and insert one under your own signature, in brackets, or something of that kind, I will submit without a murmur, if you will add this remark, as quoted from myself, to wit: 'I desire simply to ask the reader to remember that Major Powell has been accustomed to the vast sterile wastes of the interior of the continent, and has not visited the rich forests and teeming rivers of California.' But I should greatly prefer that you would simply disavow the estimates, and throw the whole responsibility upon me.

"This permission I give you; but I have waded too many rivers and climbed too many mountains to abate one jot of my opinions or beliefs for any carpet-knight who yields a compiling-pen in the office of the — or —. If any critic, sitting in his comfortable parlor in New York, and reading about the sparse aboriginal popu-

The effect of the 1861 flood cannot be firmly established; but it is clear that the tribe remained on the Klamath thereafter.⁸ For later years, Kroeber estimated that the population in 1895 was 900, and, in 1910, 668. Kroeber 19. From this it would appear that the flood at least did not cause a dissolution of the tribe; on the contrary, the Yuroks continued to reside in the area through the turn of the century and beyond.

The Act of April 8, 1864, 13 Stat. 39, designated California as one Indian superintendency. It also recited that "there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations." It further provided that "the several Indian reservations in California which shall not be retained . . . under . . . this act, shall . . . be surveyed into lots or parcels . . . and . . . be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry." *Id.*, at 40.

lations of the cold forests of the Atlantic States, can overthrow any of my conclusions with a dash of his pen, what is the use of the book at all? As Luther said, at the Diet of Worms, 'Here I stand; I cannot do otherwise.'

"I beg you, my dear major, not to consider anything above written as in the slightest degree disrespectful to yourself: such is the farthest remove from my thoughts." Powers 2-3.

Powers' estimates were not altered, and the above quoted letter was placed sympathetically by Major Powell in the introductory section of Powers' published study.

⁸ 1864 Report 122; Opinion dated January 20, 1891, of the Assistant Attorney General for the Department of the Interior, quoted in *Crichton v. Shelton*, 33 I. D., at 210; Kroeber 19. Another source estimates that in 1871 the Indian population along the Klamath was 2,500. Report of D. H. Lowry, Indian Agent, September 1, 1871, noted in *Short v. United States*, No. 102-63, at 35 (Report of Commissioner, Court of Claims, 1972).

At the time of the passage of the 1864 Act there were, apparently, three reservations in California: The Klamath River, the Mendocino, and the Smith River. It appears, also, that the President did not take immediate action, upon the passage of the Act, to recognize reservations in California. It was not until 1868 that any formal recognition occurred, and then it was the Congress, rather than the President, that acted. In that year Congress discontinued the Smith River Reservation, 15 Stat. 221, and restored the Mendocino to the public lands. *Id.*, at 223. No similar action was taken with respect to the Klamath River Reservation. *Crichton v. Shelton*, 33 I. D., at 209. Congress made appropriations for the Round Valley Reservation, 15 Stat. 221, and for it and the Hoopa Valley Reservation in 1869, 16 Stat. 37, although neither of these, apparently, had been established theretofore by formal Executive Order.⁹

The Klamath River Reservation, although not re-established by Executive Order or specific congressional action, continued, certainly, in *de facto* existence. Yuroks remained on reservation land, and the Department of Indian Affairs regarded the Klamath River Reservation as "in a state of Indian reservation" throughout the period from 1864 to 1891.¹⁰ No steps were taken to sell the reservation, or parts thereof, under the 1864 Act. Indeed, in 1879, all trespassers there were removed by the military. In 1883 the Secretary of the Interior directed that allotments of land be made to the Indians

⁹ The Hoopa Valley Reservation was located August 21, 1864, but formally set apart for Indian purposes, as authorized by the 1864 Act, by President Grant only by Executive Order dated June 23, 1876. Kappler 815. See Appendix map. The area is that described as the "Original Hoopa Valley Reservation."

¹⁰ Letter dated April 4, 1888, from the Commissioner of Indian Affairs to the Secretary of the Interior, quoted in *Crichton v. Shelton*, 33 I. D., at 211, 212.

on the reservation.¹¹ In February 1889, the Senate, by resolution, directed the Secretary of the Interior "to inform the Senate what proceedings, if any, had been had in his Department relative to the survey and sale of the Klamath Indian reservation . . . in pursuance of the provisions of the act approved April 8, 1864." 20 Cong. Rec. 1818. In response, the Commissioner of Indian Affairs, by letter dated February 18, 1889, to the Secretary disclosed that no proceedings to this effect had been undertaken.¹² An Assistant Attorney General for the Department of the Interior expressed a similar view in an opinion dated January 20, 1891.¹³

¹¹ The allotments, however, were postponed "on account of the discovery of gross errors in the public surveys." *Id.*, at 211; 1885 Report XLVIII.

¹² "In response to said resolution, I have to state that I am unable to discover from the records or correspondence of this office that any proceedings were ever had or contemplated by this Department for the survey and sale of said reservation under the provisions of the act aforesaid; on the contrary, it appears to have been the declared purpose and intention of the superintendent of Indian affairs for California, who was charged with the selection of the four reservations to be retained under said act, either to extend the Hoopa Valley Reservation (one of the reservations selected under the act), so as to include the Klamath River Reservation, or else keep it as a separate independent reservation, with a station or subagency there, to be under control of the agent at the Hoopa Valley Reservation, and the lands have been held in a state of reservation from that day to this (Ex. Doc. 140, pp. 1, 2)." Quoted in *Crichton v. Shelton*, 33 I. D., at 212.

¹³ "Pushing aside all technicalities of construction, can any one doubt that for all practical purposes the tract in question constitutes an Indian reservation? Surely, it has all the essential characteristics of such a reservation; was regularly established by the proper authority; has been for years and is so occupied by Indians now, and is regarded and treated as such reservation by the executive branch of the government, to which has been committed the management of Indian affairs and the administration of the public land system It is said, however, that the

In 1888, in a forfeiture suit, the United States District Court for the Northern District of California concluded that the area within the Klamath River Reservation was not Indian country, within the meaning of Rev. Stat. § 2133, prescribing the penalty for unlicensed trading in Indian country. The court concluded that the land comprising the reservation was not retained or recognized as reservation land pursuant to the 1864 Act and that, therefore, it no longer constituted an Indian reservation. *United States v. Forty-eight Pounds of Rising Star Tea, Etc.*, 35 Fed. 403. This holding was expressly affirmed on appeal to a circuit judge. 38 Fed. 400 (CCND Cal. 1889). The Assistant Attorney General, in the opinion referred to above, conceded the probable correctness of the judgment but was not convinced that his own views were erroneous, and he could not assent to the reasoning of the court. He felt that the court's comments as to the abandoned status of the reservation "were *dicta* and not essential to the decision of the case before the court." *Crichton v. Shelton*, 33 I. D., at 215.

Klamath River reservation was abolished by section three of the act of 1864. Is this so?

"In the present instance, the Indians have lived upon the described tract and made it their home from time immemorial; and it was regularly set apart as such by the constituted authorities, and dedicated to that purpose with all the solemnities known to the law, thus adding official sanction to a right of occupation already in existence. It seems to me something more than a mere implication, arising from a rigid and technical construction of an act of Congress, is required to show that it was the intention of that body to deprive these Indians of their right of occupancy of said lands, without consultation with them or their assent. And an implication to that effect is all, I think that can be made out of that portion of the third section of the act of 1864 which is supposed to be applicable." Quoted in *Crichton v. Shelton*, 33 I. D., at 212-213.

Thus, as of 1891, it may be fair to say that the exact legal status of the Klamath River Reservation was obscure and uncertain. The petitioner in his brief here, p. 14, states that the reservation "ceased to exist in 1876, at the latest."

Any question concerning the reservation's continuing legal existence, however, appears to have been effectively laid to rest by an Executive Order dated October 16, 1891, issued by President Benjamin Harrison.¹⁴ By the specific terms of that order, the Hoopa Valley Reservation, which, as we already have noted, was located in 1864 and formally set apart in 1876, and which was located about 50 miles upstream from the Klamath River's mouth, was extended so as to include all land, one mile in width on each side of the river, from "the present limits" of the Hoopa Valley Reservation to the Pacific Ocean. The Klamath River Reservation, or what had been the reservation, thus was made part of the Hoopa Valley Reservation, as extended.

The reason for incorporating the Klamath River Reservation in the Hoopa Valley Reservation is apparent. The 1864 Act had authorized the President to "set apart" no more than four tracts for Indian reservations in California. By 1876, and certainly by 1891, four reserva-

¹⁴ "It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 18, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however*, That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended." Kappler 815.

tions already had been so set apart. These were the Round Valley, referred to above, the Mission,¹⁵ the Hoopa Valley, and the Tule River, Kappler 830-831. Thus, recognition of a fifth reservation along the Klamath River was not permissible under the 1864 Act. Accordingly, the President turned to his authority under the Act to expand an existing, recognized reservation. He enlarged the Hoopa Valley Reservation to include what had been the Klamath River Reservation as well as an intervening riparian strip connecting the two tracts.¹⁶ The President's continuing authority so to enlarge reservations and, specifically, the legality of the 1891 Executive Order, was affirmed by this Court in *Donnelly v. United States*, 228 U. S. 243, 255-259, 708 (1913), and is not challenged here.

II

This general background as to the origin and development of the Klamath River Reservation is not contested by either party. The reservation's existence, pursuant to the Executive Order of 1891, is conceded. The present controversy relates to its termination subsequent to 1891,

¹⁵ Kappler 819-824. It is noteworthy that the boundaries of the Mission Reservation were altered repeatedly between 1870 and 1875, and even thereafter. These actions were taken under the President's continuing authority to set apart and add to or diminish the four reservations authorized under the 1864 Act. *Donnelly v. United States*, 228 U. S. 243, 708 (1913). In its final form, the Mission Reservation consisted of no less than 19 different and noncontiguous tracts. Kappler 819-824; *Crichton v. Shelton*, 33 I. D., at 209-210.

¹⁶ See Appendix map. The strip of land between the Hoopa Valley Reservation and the Klamath River Reservation is referred to there as the "Connecting Strip." Under the 1891 Executive Order the Hoopa Valley Reservation was extended to encompass all three areas indicated on the map. The connecting strip and the old Klamath River Reservation frequently are referred to as the Hoopa Valley Extension.

and turns primarily upon the effect of the Act of June 17, 1892, 27 Stat. 52, entitled "An act to provide for the disposition and sale of lands known as the Klamath River Indian Reservation." This Act provided:

"That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: *Provided*, That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians *Provided further*, That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children."

The respondent Director argues that this statute effected the termination of the Klamath River Reservation. The petitioner urges the contrary. It is our task, in light of the language and purpose of the Act, as well as of the historical background, outlined above, to determine the proper meaning of the Act and, consequently, the current status of the reservation.

The respondent relies upon what he feels is significant language in the Act and upon references in the legislative history. He contends, "The fact that the lands were to be opened up for settlement and sale by homesteaders strongly militates against a continuation of such reservation status." Brief for Respondent 3.

We conclude, however, that this is a misreading of the effect of the allotment provisions in the 1892 Act. The meaning of those terms is to be ascertained from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388. That Act permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished.¹⁷ Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways. See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115-117, 127-129, 776-777 (1958).¹⁸ Under the 1887 Act, however, the President was not re-

¹⁷ The trust period on allotments to Indians on the Klamath River Reservation expired in 1919, but was later extended by Congress by the Act of December 24, 1942, 56 Stat. 1081, 25 U. S. C. § 348a. See S. Rep. No. 1714, 77th Cong., 2d Sess. (1942). And in 1958 Congress restored to tribal ownership vacant and undisposed-of ceded lands on various reservations, including 159.57 acres on the Klamath River Reservation. Pub. L. 85-420, 72 Stat. 121.

¹⁸ For an extended treatment of allotment policy, see D. Otis, History of the Allotment Policy, in Readjustment of Indian Affairs. Hearings on H. R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 428-440 (1934). The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984 *et seq.*, now amended and codified as 25 U. S. C. § 461 *et seq.*

quired to open reservation land for allotment; he merely had the discretion to do so.

In view of the discretionary nature of this presidential power, Congress occasionally enacted special legislation in order to assure that a particular reservation was in fact opened to allotment.¹⁹ The 1892 Act was but one example of this. Its allotment provisions, which do not differ materially from those of the General Allotment Act of 1887, and which in fact refer to the earlier Act, do not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation. See *Seymour v. Superintendent*, 368 U. S. 351, 357-358 (1962). Rather, allotment under the 1892 Act is completely consistent with continued reservation status. This Court unanimously observed, in an analogous setting in *Seymour*, 368 U. S., at 356, "The Act did no more [in this respect] than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." See *United States v. Celestine*, 215 U. S. 278 (1909); *United States v. Nice*, 241 U. S. 591 (1916). See also *Wilbur v. United States*, 281 U. S. 206 (1930); *Donnelly v. United States*, *supra*.

III

The respondent further urges, however, that its view of the effect of the 1892 Act is supported by the Act's reference to "what was [the] Klamath River Reservation." According to the respondent, this reference, and other

¹⁹ See, for example, the Act of March 2, 1889, 25 Stat. 888 (Sioux Reservations), and *United States v. Nice*, 241 U. S. 591 (1916); the Act of March 22, 1906, 34 Stat. 80 (Colville Reservation), and *Seymour v. Superintendent*, 368 U. S. 351 (1962); the Act of May 29, 1908, 35 Stat. 460 (Cheyenne River and Standing Rock Reservations), and *United States ex rel. Condon v. Erickson*, — F. 2d — (CA8 1973), *aff'g* 344 F. Supp. 777 (SD 1972).

references in the legislative history, compel the conclusion that Congress intended to terminate the reservation in 1892.

The 1892 Act, to be sure, does refer to the Klamath River Reservation in the past tense. But this is not to be read as a clear indication of congressional purpose to terminate. Just a few weeks before the bill (H. R. 38, 52d Cong., 1st Sess.), which eventually became the Act, was reported out of committee on February 5, 1892, H. R. Rep. No. 161, 52d Cong., 1st Sess., the President had formally extended the Hoopa Valley Reservation to include the Klamath River Reservation. And only that portion of the extension which had been the Klamath River Reservation was the subject of the 1892 Act. The reference to the Klamath River Reservation in the past tense seems, then, merely to have been a natural, convenient, and shorthand way of identifying the land subject to allotment under the 1892 Act.²⁰ We do not believe the reference can be read as indicating any clear purpose to terminate the reservation directly or by innuendo.

²⁰ The respondent argues, however, that Congress, perhaps unacquainted with the Executive Order of October 1891, intended this language to convey the view expressed in the House Report, H. R. Rep. No. 161, *supra*, 23 Cong. Rec. 1598-1599 (1892), that the Klamath River Reservation had long been abandoned and, in fact and in law, had already been terminated.

It is clear from the text, *infra*, that there were efforts in certain quarters of the House to terminate the reservation and open it for white settlement. See *Short v. United States*, *supra*, at 34-52. While the respondent's interpretation of the phrase is plausible, it is no less plausible to conclude, in light of the repeated and unsuccessful efforts by the House to terminate the reservation, that the Senate proponents of the legislation were not inclined to make their cause (of requiring allotments) less attractive to the House by amending the bill to refer to the "former Klamath River Reservation, now part of the Hoopa Valley Reservation" rather than "what was [the] Klamath River Reservation."

The respondent also points to numerous statements in the legislative history that, in his view, indicate that the reservation was to be terminated. We need not refer in detail to the cited passages in H. R. Rep. No. 161, *supra*, or to the debates on the bill, 23 Cong. Rec. 1598-1599, 3918-3919 (1892), for there is no challenge here to the view that the House was generally hostile to continued reservation status of the land in question. In our estimation, however, this very fact, in proper perspective, supports the petitioner and undermines the respondent's position.

As early as 1879, there were efforts in Congress to abolish the Klamath River Reservation. From that date to 1892 strong sentiment existed to this effect. But it does not appear that termination ever commanded majority support. The advocates of termination argued that the reservation, as of 1879, long had been abandoned; that the land was useless as a reservation; and that many white settlers had moved on to the land and their property should be protected. See H. R. Rep. No. 1354, 46th Cong., 2d Sess., 5 (1880). That whites had settled there is clear, but the view that no Indians remained after the flood of 1861 appears to have been a gross misconception on the part of those who sought termination.²¹

The first bill providing for public entry and sale of the Klamath River Reservation was introduced in the Senate

²¹ The Department of the Interior took issue with the Committee's population estimates. H. R. Rep. No. 1148, 47th Cong., 1st Sess., 1-3 (1882). In a letter transmitted to the Committee on Indian Affairs in 1881, an infantry lieutenant, acting as Indian Agent, suggested that the Committee's population estimates were "gleaned principally from civilians, who are, I believe, somewhat inclined to lessen the number, thinking doubtlessly that the smaller the number the greater the likelihood of its being thrown open to settlers." *Id.*, at 2.

on May 28, 1879. S. R. 34, 46th Cong., 1st Sess.; 9 Cong. Rec. 1651. The resolution referred to the reservation's having been "abandoned" in 1855 "and the tribe removed to another reservation established for its use." No action was taken on the bill, and another, of the same purport, was introduced on January 12, 1880, in the House. H. R. 3454, 46th Cong., 2d Sess.; 10 Cong. Rec. 286. This bill provided that the reservation "be, and the same is hereby, abolished" and authorized and directed the Secretary of the Interior to survey the lands and have them made subject to homestead and pre-emption entry and sale "the same as other public lands." It is clear from the report on this second bill, H. R. Rep. No. 1354, *supra*, at 1-5, that the establishment of the reservation in 1855 was viewed as a mistake and an injustice. According to the Report, the reservation had been abandoned after the 1861 freshet, and the Indians had moved to the Smith River and, later, the Hoopa Valley Reservations. White settlers had moved in, and wished to exploit the lumber and soil of the area which, some said, "has no equal in California as a fruit and wine growing country." *Id.*, at 5. Inasmuch as the reservation blocked access to the river, the resources of the area could not be developed. Although unmentioned in that Report, the Office of Indian Affairs opposed the bill. See H. R. Rep. No. 1148, 47th Cong., 1st Sess., 1 (1882). The bill as reported was recommitted and no further action was taken. 10 Cong. Rec. 3126 (1880).

An identical bill was introduced in the following Congress. H. R. 60, 47th Cong., 1st Sess.; 13 Cong. Rec. 90 (1881). The Commissioner of Indian Affairs opposed the bill as introduced, but stated that he would not oppose it if provision for prior allotments to the Indians was made. H. R. Rep. No. 1148, *supra*, at 2. The Commissioner's proposed amendment was approved by

the Committee, 13 Cong. Rec. 3414 (1882), but no action on the bill was taken by the full House.

In 1883 and 1884 three more bills were introduced. It is of interest to note that each acceded to the request of the Commissioner that provision be made for prior allotments to resident Indians. H. R. 112, 48th Cong., 1st Sess.; 15 Cong. Rec. 62 (1883); S. 813, 48th Cong., 1st Sess.; 15 Cong. Rec. 166 (1883); H. R. 7505, 48th Cong., 1st Sess.; 15 Cong. Rec. 5923 (1884). Each bill would have "abolished" the reservation and would have made the land subject to homestead and pre-emption entry. None of the bills was enacted, although passage must have been generally regarded as likely, for the Indian Bureau in 1883 began the work of allotment and survey, perhaps in anticipation of passage.

In 1885 two bills were introduced in the House. Each was substantially identical to those introduced in 1883 and 1884. H. R. 158 and H. R. 165, 49th Cong., 1st Sess.; 17 Cong. Rec. 370 (1885). No action was taken on either bill.

No further bills, apparently, were introduced until 1889. During the intervening period, however, the General Allotment Act of 1887, 24 Stat. 388, was passed and thereafter amended, 26 Stat. 794. The *Rising Star Tea* case, *supra*, 35 Fed. 403, was also decided.

In 1889 a bill providing for the allotment of the Klamath River Reservation was introduced. The allotments, however, were to be made in a manner inconsistent with the General Allotment Act. H. R. No. 12104, 50th Cong., 2d Sess.; 20 Cong. Rec. 756 (1889). And after affirmance of the *Rising Star Tea* case by the circuit court, 38 Fed. 400 (1889), identical bills were introduced in the House and the Senate providing, without mention of allotment, that "all of the lands embraced in what was Klamath River Reservation . . . are hereby de-

clared to be subject to settlement, entry, and purchase" under the land laws. H. R. 113, 51st Cong., 1st Sess.; 21 Cong. Rec. 229 (1889); S. 297, 51st Cong., 1st Sess.; 21 Cong. Rec. 855 (1890). The Indian office opposed the bills, recommending that they be amended to provide for allotments to the Indians under the General Allotment Act, that surplus lands be restored to the public domain, and that the proceeds be held in trust for the Klamath River Indians. See *Short v. United States*, *supra*, at 44-45. H. R. 113 was reported out of committee with certain amendments, including one to the effect that proceeds arising from the sale of lands were to be used for the "removal, maintenance, and education" of the resident Indians, the Hoopa Valley Reservation being considered the place of removal. Allotments to the Indians on the Klamath Reservation, however, were emphatically rejected. H. R. Rep. No. 1176, 51st Cong., 1st Sess., 2 (1890). The bill was so amended and passed the House. 21 Cong. Rec. 10701-10702 (1890). It died in the Senate.

In light of the passage of this last bill in the House and the presence of the *Rising Star Tea* opinions, the Indian Department moved to have the Klamath River Reservation land protected for the Indians residing there. The details of this effort, including the opinion of the Assistant Attorney General, referred to above, are outlined in the Commissioner's report in *Short v. United States*, *supra*, at 45-50. These efforts culminated in President Harrison's Executive Order of October 1891 expanding the Hoopa Valley Reservation to include the Klamath River Reservation.

It is against this background of repeated legislative efforts to terminate the reservation, and to avoid allotting reservation lands to the Indians, that the 1892 Act was introduced. H. R. 38, 52d Cong., 1st Sess.; 23 Cong. Rec. 125 (1892). The bill provided for the settlement.

entry, and purchase of the reservation land and specified that the proceeds should be used for the "removal, maintenance, and education" of the resident Indians. No allotments were provided for, as the Indians were "semicivilized, disinclined to labor, and have no conception of land values or desire to cultivate the soil." H. R. Rep. No. 161, 52d Cong., 1st Sess., 1 (1892). The House Committee on Indian Affairs amended the bill by changing the word "and" to "or" in the proviso relating to the use of proceeds. *Id.*, at 2.

The bill passed the House without change. 23 Cong. Rec. 1598-1599 (1892). It was stricken in the Senate, however, and another version was substituted deleting reference to the removal of the Indians and providing that before public sale the land should be allotted to the Indians under the General Allotment Act of 1887, as amended. 23 Cong. Rec. 3918-3919 (1892). This substitute measure had the support of the Interior Department. *Id.*, at 3918. The Senate called for a conference with the House, *Id.*, at 3919, and the conference adopted the Senate version with amendments. Sen. Mis. Doc. No. 153, 52d Cong., 1st Sess. (1892). The bill was then passed and became the 1892 Act.

IV

Several conclusions may be drawn from this account. First, the respondent's reliance on the House Report and on comments made on the floor of the House is not well placed. Although the primary impetus for termination of the Klamath River Reservation had been with the House since 1871, this effort consistently had failed to accomplish the very objectives the respondent now seeks to achieve. Likewise, the House in 1892 failed to accomplish these objectives, for the Senate version, supported by the Interior Department, was substituted for that of the House. The Senate version, ultimately enacted,

provided for allotments to the Indians and for the proceeds of sales to be held in trust for the "maintenance and education," not the removal, of the Indians. The legislative history relied upon by the respondent does not support the view that the reservation was terminated; rather, by contrast with the bill as finally enacted, it compels the conclusion that efforts to terminate the reservation by denying allotments to the Indians failed completely.

A second conclusion is also inescapable. The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated. This is apparent from the very language of 18 U. S. C. § 1151, defining Indian country "notwithstanding the issuance of any patent" therein. More significantly, throughout the period from 1871-1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms. Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation.²² The Court stated in *United States v. Celestine*, 215 U. S., at 285, that "when Congress has once established a reservation all tracts included within

²² Congress has used clear language of express termination when that result is desired. See, for example, 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) (adopted just two weeks after the 1892 Act with which this case is concerned, providing that the North Half of the Colville Indian Reservation, "the same being a portion of the Colville Indian Reservation . . . be, and is hereby, vacated and restored to the public domain"), and *Seymour v. Superintendent*, 368 U. S., at 354; 33 Stat. 218 (1904) ("the reservation lines of the said Ponca, and Otoe and Missouri Indian reservations be, and the same are hereby, abolished").

it remain a part of the reservation until separated therefrom by Congress." A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. See *Seymour v. Superintendent*, *supra*; *United States v. Nice*, *supra*.²³

Finally, our conclusion that the 1892 Act did not terminate the Klamath River Reservation is reinforced by repeated recognition of the reservation status of the land after 1892 by the Department of the Interior and by Congress. In 1904 the Department, in *Crichton v. Shelton*, *supra*, ruled that the 1892 Act reconfirmed the continued existence of the reservation. In 1932 the Department continued to recognize the Klamath River Reservation, albeit as part of the Hoopa Valley Reservation,²⁴ and it continues to do so today. And Congress has recognized the reservation's continued existence by extending the period of trust allotments for this very reservation by the 1942 Act, described above, 25 U. S. C. § 348a, and by restoring to tribal ownership certain vacant and undisposed-of ceded lands in the reservation by the 1958 Act, *supra*.²⁵

²³ In *United States ex rel. Condon v. Erickson*, — F. 2d — (1973), the United States Court of Appeals for the Eighth Circuit reached a similar conclusion in a case presenting issues not unlike those before us. The Court concluded, — F. 2d. at — (slip opinion, at 11), that "a holding favoring federal jurisdiction is required unless Congress has *expressly or by clear implication* diminished the boundaries of the reservation opened to settlement" (emphasis in original).

²⁴ Hearings before a Subcommittee of the Senate Committee on Indian Affairs, Survey of Conditions of the Indians in the United States, Part 29, California, 72d Cong., 1st Sess., 15532 (1934).

²⁵ Although subsequent legislation usually is not entitled to much weight in construing earlier statutes, *United States v. Southwestern Cable Co.*, 392 U. S. 157, 170 (1968), it is not always without significance. See *Seymour v. Superintendent*, 368 U. S., at 356-357.

We conclude that the Klamath River Reservation was not terminated by the Act of June 17, 1892, and that the land within the boundaries of the reservation is still Indian country, within the meaning of 18 U. S. C. § 1151.

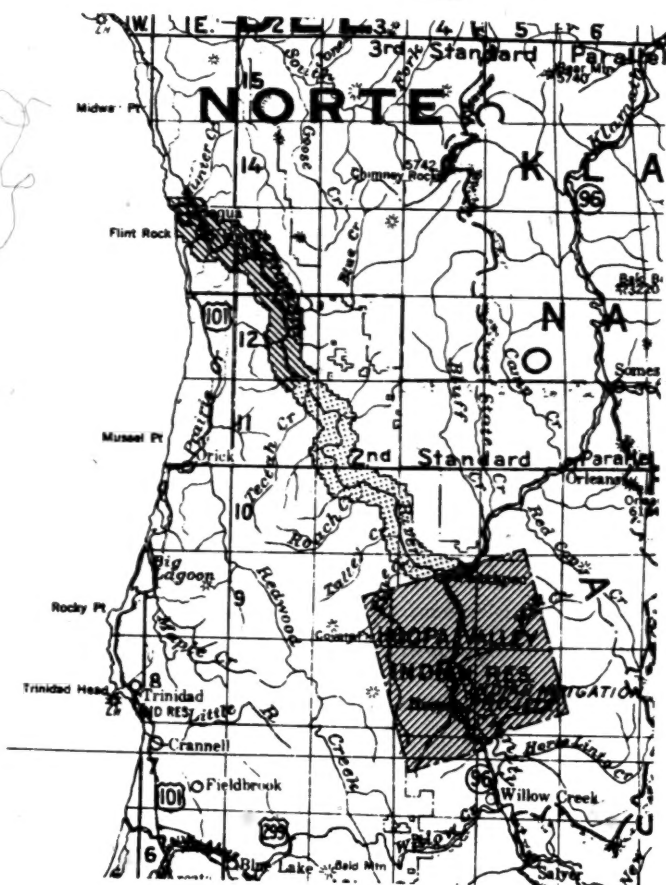
The judgment of the Court of Appeal is reversed, and the case is remanded for further proceedings.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

MAP OF HOOPA VALLEY INDIAN RESERVATION, CALIFORNIA*

Scale: 1 inch = 12 miles



- LEGEND:
- Old Klamath River Reservation.
 - Connecting Strip.
 - Original Hoopa Valley Reservation.

*United States Department of Interior, General Land Office 1944.